The Madras Law Journal.

PART I.] JULY 1915. [VOL. XXIX.

NOTES OF INDIAN CASES.

Annapurna Dasee *v.* Nalini Mohan Das, I. L. R., 42 C. 10.

The conclusion of the learned Judges in this case that a succession certificate may be granted in respect of *any portion* of a debt due to a deceased person, certainly goes further than the authorities cited. Impressed as one may be by some of the complications and hardships pointed out in *Mahomed Abdul Hossain* v. *Sarifan* 1, as resulting from the extreme view taken in *Ghafur Khan* v. *Kalandari Begam* 2, it seems fairly clear that the Succession Certificate Act did not contemplate certificates being granted in respect of 'fractions' of a debt. Neither in S. 4 (1) (a) which describes the claimant as a person 'entitled to the effects of the deceased person or *to any part thereof*' nor in S. 7 (4) which deals with the case of 'more than one applicant interested in the estate of the deceased' is there anything to justify a splitting up of the debt, whether by the court or at the option of the applicant. The arguments of convenience or hardship are really matters for the legislature. Much of the observations on the present question, in *Mahomed Abdul Hossain's case* may well be said to be *obiter*, in the view there taken by the learned Judges as to the nature of the right to a deferred dower, *i.e.* that it is not a 'single' debt devolving (on death) on two or more heirs in several shares, but that each heir has a distinct right, enforceable by himself, in respect of his share. And as for the stress laid on the difference between the question of the grant of a certificate for a share and the maintainability of a suit for a share, it ought not to be forgotten that the Act is intimately connected with procedure law which is adopted as the means of enforcing the Act, *viz.*, by the prohibition in S. 4 that no Court shall pass a decree except on production of a certificate etc. The legislature should not be assumed to have

1. (1911) 16 C. W. N. 231 s. c. 15 C. L. J. 384.
2. (1910) I. L. R. 33 A. 327.

provided for the grant of a partial certificate with the clear knowledge that no suit could be maintained on the basis of it. Even taking into consideration the possibility of voluntary payments by the debtors (when they are assured protection under S. 16 of the Act), the question of 'shares' as between different heirs is not one always free from difficulty and it is difficult to assume that no provision for its determination would have been made in the Act, if the legislature had contemplated such fractional certificates. Justice Mukerjee may be right in criticising the Allahabad Full Bench in so far as they held that certificate duty must be paid in respect of the whole amount due to the deceased even when the debtor himself has become entitled to a portion thereof as one of the heirs of the creditor (cf. *Muhammad Ali Khan* v. *Bibi Puttan* [1],) but we venture to doubt if any principle can be found on which to base a claim for reduction of duty on the ground that as the debtor is not solvent enough to pay the whole debt, the heirs are willing to relinquish the irrecoverable portion.

Accepting however to the full, the force of Mr. Justice Mukherjee's observations, we doubt if he meant to lay down that even without reference to any question, of the 'share' due to the applicant or any question of relinquishment of the portion not claimed, a person can at his option obtain a certificate in respect of *any portion* of a debt due to the deceased. This is practically what the learned judges have held in the case under notice. The result would be—and the tenor of their observations would even seem to justify several successive applications by the same person for certificates in respect of different portions of the same debt. Surely this could not have been intended, though even such a view may not affect the revenue derivable under the Act.

Abdulla Hossein Chowdhury *v.* Administrator General of Bengal, I. L. R. 42 C. 35.

This case furnishes an illustration of the doubts and difficulties arising from the multiplicity of legislative machinery and the piecemeal character of the legislation governing India. In determining the question of the validity of S. 12 (2) of the Limitation Act, in so far as it applies to applications for leave to appeal to the Privy Council, we doubt if much reliance could be placed on

1. (1896) I. L. R. 19 A. 129.

the fact that S. 8 of Act VI of 1874 was submitted to and approved by the Judicial Committee; for even if this could be taken to imply any consideration of or opinion on the question of its *validity*, the provision as it then stood did not really 'affect' the rule laid down by the Order in Council of 1838. Beyond reproducing the limitation of six months, it only added what even in the absence of such a provision, might have been held as a matter of principle (well recognised though sometimes doubted) *i. e.*, that if the six months expire when the court is closed the application may be made on the day that the Court re-opens. The Limitation Act of 1908 distinctly interferes with the order in Council, by providing for the exclusion of the time requisite for obtaining a copy of the decree. The only solid ground to proceed upon would seem to be that the High Courts Act and the Letters Patent clearly contemplate the alteration of the existing Orders in Council, by the exercise of the legislative powers of the Governor-General in Council.

Raghunath Das *v.* **Sundara Das Khetri,** I. L. R., 42 C. 72 (P. C.).

The observations in *Malkarjun* v. *Narhari* [1], though carefully worded, have given rise to frequent misapprehension (if not also misapplication) as to the effect of faults of procedure. Their Lordships' Judgment in the present case is based on the fact that the notice served on the Official Assignee, after the insolvency of the judgment-debtor, merely called upon him to show cause why he should not be substituted in the suit for the judgment-debtors and did not ask him to show why the decree should not be executed against him. Technical as this distinction may seem, there is really, as their Lordships point out, a great deal to be said for it; but for this circumstance, it is impossible to see how the Official Assignee could have allowed the property to be sold in execution in respect of an unsecured debt. We cannot however help observing that it is difficult to see how S. 248 can apply to the case. The definition of 'legal representative' makes it clear that it has reference only to devolution *on the death* of a party; the Official Assignee is not the 'legal representative' of the insolvent. As for Ss. 32 and 372 of the Code of 1882 it is, as their

1. (1900) I. L. R. 25 B. 337.

Lordships point out, very doubtful if they can be availed of *after* decree; and there is the further question whether in the case of an action 'in personam' S. 372 can be applied at all, even if the insolvency happened during the pendency of the suit; for in such a case there is no 'devolution of interest' in the subject-matter of the suit (Cf. observations of Sir Bhashyam Iyengar in *Punithavelu* v. *Bhashyam Iyengar* [1], on *Miller* v. *Budh Singh* [2].)

Reading through the judgment one cannot help wondering how the learned Judges of the High Court gave effect to the title alleged under the execution sale. All that they say is that 'the Official Assignee having been added and having taken no exception to the procedure the sale must be regarded as having taken place in his presence and as binding on him' and *Malkarjun* v. *Narhari* [3], is relied on to get over all irregularity. In distinguishing the case before them from *Malkarjun* v. *Narhari* [3] their Lordships of the Judicial Committee endorse the view taken in *Gopal Chunder Chaterjee* v. *Gunamoni Dossee* [4] that a notice under S. 248 of the old Code (O. 21, R. 22 in the Code of 1908) is essential to give the executing court jurisdiction to sell the property as against the legal representative of a deceased judgment-debtor. This must be taken to overrule the more recent decisions in Calcutta which hold that before a sale can be set aside on the ground of omission to serve such a notice it must be proved that the omission has resulted in substantial injury (see *Kumed Beeva* v. *Prasanna Kumar Roy* [5] and cases there cited.) In an earlier part of the judgment their Lordships express approval of the view taken in *Sarkies* v. *Bandho Baee* [6] that an order for sale has no greater effect than an attachment, in affecting the title to the property or preventing, its vesting in another by operation of law. This view will, as pointed out by us on a former occasion (see 27 M. L. J. p. 8. Notes of Indian Cases) entail a reconsideration of the interpretation placed by some decisions in this country on the observations in *Suraj Bunsi Koer's case* relating to the effect of proceedings in execution upon the operation of the rule of survivorship as between members of a joint Hindu family.

1. (1901) I. L. R. 25 M. 406.
2. (1890) I. L. R. 18 C. 43.
3. (1900) I. L. R. 25 B. 337.
4. (1892) I. L. R. 20 C. 370.
5. (1912) I. L. R. 40 C. 45.
6. (1866) 1 N. W. P. 172.

Forbes v. Secretary of State for India. I. L. R., 42 C. 151.

It is possible that executors and administrators were omitted by oversight from Ss. 20 to 23 of the Income Tax Act; otherwise there is no reason why they too should not in express terms have been allowed the privilege of 'retainer' conferred by the last clause of S. 23 on trustees, curators, agents, etc. But this circumstance certainly affords no support for the argument that an executor is not liable to be taxed in respect of income received by him as executor. As to the maintainability of a suit to question, the Collector's decision, it is difficult to say what circumstances would take a case out of the very wide language of prohibition used in S. 39—except perhaps in the case of an assessment on exempted incomes. There are cases, under other fiscal enactments, holding that the *liability* to (as distinguished from the amount of) assessment may be canvassed in a Civil Court, but it must be admitted that the language of exclusion used in those enactments is generally not so comprehensive as that used here. The tenor of the Chief Justice's observations in this case would suggest that if the Collector acts 'without jurisdiction' it may be made the subject of a civil suit. But it is by no means clear from the Act what the 'essentials' of his jurisdiction are. For instance, it is not allowed to a man to come to Court and show that he does not get that amount of income which the Collector assesses him for or perhaps even that his income is below the taxable minimum. Perhaps a man can sue on the footing that he does not receive *any portion* of the income for which he has been assessed—but happily instances of this kind can scarcely ever arise.

Harchand Panaji v. Gulabchand Kanji, I. L. R., 39 B. 34, **Veeraraghava Iyer v. Muga Sait,** 27 M. L. J. 585 (F.B).

Practically the same questions were raised in both these cases; the Bombay Judgment however does not deal with the broad contention which seems to have been urged in the course of the argument, that in view of the language of S. 44 and O. 21, r. 7 C. P. C., a British Indian Court has no power to question the jurisdiction of a Native State Court to pass a decree transferred to the former for execution. On this point, the Madras

case holds—and if we may say so, rightly—that the British Indian Court has such power. On the question of the jurisdiction of the Native State Court, the Bombay Judges hold that by pleading *on the merits* as well, the defendant had submitted to its jurisdiction though in terms he protested against it. This conclusion has the support of Mr. Dicey though the law on the point is far from settled and there appears to be little or no direct authority on the point. *Boissiere* v. *Brockner* [1], cannot be safely relied on, for there Cave, J. went the extreme length of holding that even an appearance *merely to protest* (without any attempt to defend on the merits) would constitute a submission to jurisdiction—a view that does not seem to commend itself to Mr. Dicey. Professor Dicey relies on the principle of cases like *Davies* v. *Price* [2], and *Ringland* v. *Lowndes* [3], in support of his dissent from Justice Cave's view,—though the question there did not *arise* in connection with foreign judgments. But these cases are in turn inconsistent with his own view that an appearance even under protest would amount to submission, where it is accompanied by an attempt to defend on the merits: also *Voinet* v. *Barrett* [4] is, despite the eminence of the judges who took part in it, far from convincing. At any rate, it allows that the fact of a person defending the case on the merits before the foreign Court is not by itself *conclusive* on the question of that court's jurisdiction for purposes of international law. If when he appears to protect property *already attached* by the foreign court, the circumstance of his taking the chance of a decision there in his favor does not prevent him from afterwards raising the question of jurisdiction in a domestic court, there is no reason why the rule should be otherwise when he appears *under protest* and pleads on the merits as well. The position is not really explained by saying that in the one case the appearance is voluntary and in the other, not so; and the way in which the distinction has been applied in *Voinet* v. *Barrett* [4] does not seem to commend itself to eminent writers on Private International Law. It will be interesting to see if and how the House of Lords will settle these and connected questions should they come up before it in the

1. (1889) 6 T. L. R. 85.
2. (1864) 34 L. J. Q. B. 8.
3. (1864) 33 L. J. C. P. 337.
4. (1885) 55 L. J. Q. B. 39.

near future. We do not however appreciate the attempt of the Bombay Judges to distinguish the case before them from *Parry & Co.* v. *Appasami Pillai* [1]. They might have frankly said —as Wallis, C. J., said in the Madras Full Bench case—that that decision cannot any longer be accepted as correct. If the facts there can be held to support the inference of an 'involuntary' appearance, the same can be said of almost any case, for the defendant would never care to appear before the foreign court unless he expected some inconvenience to arise from a decree that may be there passed against him. Even on the facts of *Veeraraghava Iyer* v. *Muga Sait* [2], we beg leave to doubt if the defendant's appearance before the Cochin Court could be properly held to be involuntary, within the principle of *Voinet* v. *Barret*. The plaintiff had merely obtained an *interim* injunction restraining the defendant from disposing of certain logs of timber in Cochin: there was no question of 'seizure' of property by the court or of the defendant appearing to protect it. The question of 'voluntary submission' may in a sense be a question of 'fact,' but if Wallis, C. J., meant to hold that it is a matter beyond the cognisance of a court of second appeal, even when there is no dispute as to the facts with reference to which the question has to be decided, we beg to differ from him. It is a matter of 'legal inference' like a finding of 'acquiescence' which the Privy Council held can be reviewed on second appeal (see *Beni Ram* v. *Kundan Lal* [3].

Rama v. Bhagchand, I. L. R. 39 B. 41.

There is room for difference of opinion on the point dealt with in this case; but so far as one is able to see from the judgment, the learned judges do not seem to have sufficiently realised the force of the arguments against their view. It will no doubt be anomalous if a mortgagee who had obtained a decree for sale should on the mortgagor's default to pay within the time fixed be enabled to place himself by mere inaction on his part, in the position of an absolute owner. But what is the answer to it? Not to disregard established rules of procedure and allow another

1. (1880) I. L. R. 2 M. 407. 2. (1914) 27 M. L. J. 535.
3. (1899) I. L. R. 21 A. 496 (P.C.)

suit—this time by the mortgagor—for a relief which undoubtedly could have been had under the first decree. The theory of the right to redeem existing so long as the relationship of mortgagor and mortgagee subsists, is not without its limitations in adjective law as pointed out in *Vedapuratti* v. *Vallabha Valiya Raja* 1. The learned judges admit that in the new suit the mortgagor cannot go behind the decree in the mortgagee's suit in so far as it settled the amount of the mortgage debt; and this limitation they think is sufficient to satisfy the rule of *res judicata*. But, is not the whole suit—and not merely the issue as to the amount—covered by the former adjudication? Or, in the words of S. 11 C. P. C, has not the matter directly and substantially in issue in the 2nd suit—*viz.*, the plaintiff's right of redemption—been so in issue, *and also heard and decided*, in the former suit? What new point, right or question has the Court to hear or decide in the second suit. It will be impossible to contend that for the application of the rule of *res judicata*, to *suits* (as distinguished from 'issues'), the persons should on both occasions be arrayed alike, whether as plaintiffs or as defendants. It accordingly seems to us that there are strong reasons against the maintainability of a second suit in respect of the mortgage, whether the first suit had been brought by the mortgagor or by the mortgagee. The only way out of the anomaly pointed out at the outset would seem to be indicated in *Audipurnam Pillai* v. *Gopalasami Moodely* 2. As therein held, the time limit for payment in the decree for sale is only intended to stay the hands of the mortgagee, during that period; the mortgagor (defendant) can therefore even after the lapse of the time fixed, pay the decree amount into Court in satisfaction of the decree, and when he so pays, his claim to enforce his right to possession will properly be a question relating to the satisfaction of the decree and as such governed by S. 47 C. P. C. (old S. 244). There can be little doubt that if the mortgagor (defendant) pays within the time fixed in the decree, his claim to possession (if any) reconveyance, etc., as per terms of the decree will fall under S. 47. There is then no reason why a similar claim made on payment *after* the time fixed—assuming of course, such payment to be allowed by law—

1. (1901) I. L. R. 25 M 300. 2. (1908), I. L. R, 31 M. 354.

should not likewise come under S. 47. In this view, the mortgagor must make the payment and claim possession, etc., at least within the time allowed under Art. 178 of the Limitation Act of 1877 (the residuary article)—but even this limit seems to have been exceeded in the Bombay case under notice—and if he fails to do even that, one may be pardoned for contending that the Court need not be solicitous to help him at any cost.

The above line of reasoning proceeds on the view that the decree in the suit for sale was (under the law as it stood prior to 1908) a 'final' decree. It will be a matter for argument whether what the new code calls the 'preliminary decree' in a mortgage suit is not, under the scheme of that Code, sufficiently 'final' for the purposes of the rule of *res judicata*. Otherwise, it may be open to question whether the adjudication in the 1st suit will be binding even as regards the 'amount' fixed thereby. Under the scheme of O. XXXIV of the new Code, where the mortgagee (decree-holder) does not, on default by the mortgagor, apply for a 'final decree' under R. 5 the result will be that the suit must still be regarded as *pending*; and even then, as pointed out by Sir Bhashyam Iyengar, the *trial* of a second suit will be precluded by S. 10 C. P. C., which is even wider than S. 12 of the old Code. If it be not open to the mortgagor (as defendant) to carry the suit to 'final' decree, he must at least move the court to dismiss the suit for want of diligent prosecution by the plaintiff, before he can himself maintain an action for redemption.

Umabai *v.* Amritrao Anant. I. L. R. 39 B. 80.

It may be that an order in execution, which though not warranted by law, had become final as between the parties, could not be nullified by means of a later order striking the petition off the file before the decree is satisfied as per terms of such irregular order. But we are unable to agree that the order in question in this case is one falling under O. 21, r. 52, C. P. C., or any of the other provisions in the execution chapter. It was to the effect that the defendant's share of the revenue of three Inam villages should (year after year till the decree is satisfied) be paid by the

village officials to the Court's order and was to be paid by the Court to the plaintiff. It is clear, as was held in *Tulaji* v. *Balabhai* [1], that O. 21, r. 52 only provides for the attachment of property which *at the time of such attachment* is in the custody of the Court or any public officer. The learned Judges think that the above order did not violate this principle, inasmuch as the 'estate' which produced the revenue was in existence at the time and on the attachment of the 'estate', the revenue accruing therefrom *in futuro* will be on the same footing as 'dividend or 'interest' provided for in the rule. As against this view there is, first, the question, which the learned Judges themselves advert to, namely, whether O. 21, r. 52 contemplates the attachment of 'immovable property' at all. But assuming that it does, it will apply only if the 'estate' which is attached and not merely the 'revenue' therefrom is 'in the custody of a public officer.' In the particular case, the fact that the village officials collected the revenue and paid it to the defendant will not constitute possession or custody of the 'estate' (meaning the right to the revenue) by the village officials. Further, even if the case comes within O. 21, r. 52, we are unable to see what power the Court had to direct that the revenue should be paid into Court by the village officials. The rule only provides for 'attachment'; and in all 'garnishee' cases, the Indian Procedure only provides for sale of the property attached (whether movable or immovable), though the garnishee *may if he chooses* pay the money into Court. It is only in the special case of salaries or allowances of public officers, railway servants, &c., that O. 21, r. 48, C. P. C. imposes an *obligation*, on the part of the garnishee (so to say) to pay into Court and the obligation is extended in this case both to salaries accrued due and to salaries becoming payable *in futuro*.

---

1. (1896) I. L. R. 22 B. 39.

NOTES OF INDIAN CASES.

Basangavda *v.* Basangavda. I. L. R. 39 B. 87.

The main question of Hindu Law decided in the case is of little importance outside the Bombay Presidency, as the rule of admitting the widow of a deceased Sapinda to succeed as a Sapinda is confined to that Presidency. We would, however, invite attention to the remarks of Beaman, J. in the case, as to the true scope of the doctrine of 'acceleration' by Hindu widows, the prevalent confusion between 'acceleration' and 'alienation with the reversioner's consent' and the absurdity of discussions about a reversioner 'consenting' to an alienation *in his own favour*. As usual with that learned Judge, the observations are alike instructive and refreshing.

Dhondo Ramchandra *v.* Bhikaji. I. L. R. 39 B. 138.

If one topic of mortgage law can be said to be beset with more difficulties and uncertainties than another, it is that relating to the remedies of a person holding more mortgages than one over the same property. One question in such a case is whether at all the mortgagee can sue except on *both* the mortgages. Cases like *Dorasami* v. *Venkataseshu*, [1] held that he cannot; and the *first* suit itself was dismissed as not properly constituted. It will be noticed that in such cases there is no scope for any plea of *res judicata* or bar under O. 2, r. 2, C. P. C.—for there has been no prior suit. The question of the maintainability of a suit on either of two such mortgages without including the other has, so far as Madras is concerned, now been settled by the decision of a Full Bench; and the learned Judges of the Bombay High Court, too, would seem to grant that, at any rate in view of the explanation to O. 34, r. 1 of the New Code, the first suit would be maintainable. The further question then is, what is the effect of the first suit on the other mortgage not included in it. In spite of the needless caution characterising the remarks in *Sri Gopal* v. *Prithi Singh* [2] the Bombay case holds—and, if we may say so, rightly—that a second suit on the other mortgage will not be barred under O. 2, r. 2 C. P. C.. But the learned Judges say that such a suit will be barred by the general principles of *res judicata* unless the rights under the

1. (1901) I. L. R. 25 M. 108. 2. (1902) I. L. R. 24 A. 429.

mortgage (sought to be enforced in the second suit) are *reserved* in the first suit. This conclusion they deduce from the principle of *Sri Gopal* v. *Prithi Singh.*[1] We beg leave to doubt the correctness of this view, if so broadly stated. The operation of the rule of *res judicata* in connection with a mortgage *not pleaded* in a former suit is contingent upon the existence of a *duty to plead* such mortgage in that suit; and as pointed out in *Surjiram Marwari* v. *Burhandeo Persad* [2], the rule in *Sri Gopal* v. *Prithi Singh* [1], will not apply to cases where there was no question raised in the first suit about the mortgage sought to be enforced in the second suit. (*Cf. Krishna Doyal Gir* v. *Syed Md. Amirul Hassan* [3]. The fact that both mortgages are held by the same person can make no difference for this purpose. Hayward, J. observes that the view taken by him would not substantially prejudice the mortgagee 'because, he would be able, if he so desired to keep his prior mortgage alive by requiring that the sale of the property should be subject to the prior mortgage.' But this does not help us to any decision on the legal question. It is said that if the mortgagee should be allowed to sell the property without disclosing the prior mortgage and then to enforce the prior mortgage against the execution purchaser, it may open the door to fraud, but this raises a question not of *res judicata* but of *estoppel* which will depend on the knowledge of the purchaser in each case.

It may be that after a suit and execution sale on the first mortgage, the mortgagee cannot seek to enforce a *later* mortgage: this will rest not on the rule of *res judicata,* but on the principle that a sale on a first mortgage conveys the property freed of all subsequent incumbrances; and no such question can arise when the first suit and execution sale were on the subsequent mortgage.

Satwaji Balajirav *v.* Sakhar Lal Atmaram Shet. I. L. R. 39 B. 175.

The point decided in this case is one really of 'practice' and it is to be regretted that on a question of this kind, which frequently comes up before the Court, there should be such a conflict and uncertainty as one will see from the authorities

1. (1902) I. L. R. 24 A. 429.
2. (1905) 1 C. L. J. 337.
3. (1911) 19 C. W. N 912.

referred to in the judgment under notice, and the judgment of the Madras High Court in *Ramaswami Kone v. Sundara Kone* 1. When a court fixes a time by its decree for performance of some act, it seems natural to hold that the period is to be calculated from the date of *that* decree; and if the time is allowed to elapse without performance, the right conditioned on such performance is *lost*, and it can be *revived* only by some positive direction in the decree of the appellate Court. This is substantially the basis of the ruling in *Ramaswami Kone's case*, and despite several rulings or dicta to the contrary, it seems to be well-founded in principle. Decisions with reference to limitation for purposes of execution have no bearing on the question, because they rest on the specific provision of the Limitation Act making the date of the 'appellate' decree the starting point. Nor is the decision in *Raja Bhup Indar Bahadur Singh's Case* 2, directly authoritative on the point, though Lord Hobhouse's observation,—that an appellate decree confirming the decree of the Lower Court 'adopts its terms and carries on their effect down to a later date'—is couched in very wide language. It will greatly add to the uncertainty of the law if the conclusion on the point is, as sometimes suggested, to be made to depend upon considerations as to the party appealing, *i. e.*, plaintiff or defendant, or the form which the ultimate disposal of the case takes, *i. e.* rejection, dismissal or confirmation. The rule of interpretation laid down in *Ramaswami Kone's case* seems to us the sounder one and any hardship caused thereby can be avoided if the suggestion made at the end of the judgment in that case is borne in mind by the Court and Counsel concerned with the appeal.

Dayamayi v. Ananda Mohan Roy Chowdhry. I. L. R. 42 C. 172 (F. B.)

An elaborate and interesting discussion in the course of argument (which might, with advantage, have been reported even more fully) materialised in nothing more than a few carefully worded propositions which constitute the judgment of the Court. The questions directly under consideration have little importance outside Bengal, as they relate to incidents of occupancy tenure which do not obtain elsewhere.

1. (1907) I. L. R. 31 M. 28. 2. (1900) L. R. 27 I. A. 209.

Sanyasi Charan Mandal *v.* Ashutosh Ghose. I. L. R. 42 C. 225.

The legal position of what may be called joint family firms carrying on an ancestral business is not without its anomalies and in the application of the rules of insolvency law to them, questions must arise in respect of which the English law can afford no precedent or guidance. One characteristic feature of such a firm is that even as between members *sui juris* the relationship to the common business is not contractual, and this involves the consequence—not existing in the case of ordinary partnerships—that there may be debts of the *firm*—for which the individual members are not *personally* liable, but only to the extent of their interest in the family property. The reasons urged in this case against adjudging an *infant* member of such a firm insolvent will thus equally apply to members *sui juris*. And if the receiver in insolvency can take possession only of the properties (or share) belonging to the person who is adjudged an insolvent—and this is all that S. 16 (2) of the Provincial Insolvency Act provides for—the utility of insolvency procedure will, in such cases, be reduced to a minimum and other means will have to be found for the realisation and distribution among the firm's creditors even of property admittedly liable for their debts.

In applying in this country the English rule as to the consequences of the bankruptcy of a partner, the learned judges indeed point out that under the Indian law, the insolvency of a partner does not *ipso facto* work a dissolution, but only entitles the other partners to apply to the Court to dissolve the partnership. But in the case of a joint family business, we doubt if even this can be done, without a suit for a *complete* partition. Before the insolvency and as long as the joint status continues, the managing member could dispose of the whole or any portion of the family property, to meet the liabilities of the family business. What is the effect of his insolvency on these rights and who is to exercise them thereafter—the insolvent or the receiver? The judgment seems to take no note of this aspect of the matter. An analogous question has received some discussion in *Fakir Motichand* v. *Motichand Hurruckchand* [1], *Rangayya Chetti* v. *Thanickachella Mudali* [2] and *Sadarmal* v. *Aran-*

1. (1883) I. L. R. 7 B. 438 441. 2. (1895) I. L. R. 19 M. 74.

vayal Sabhapathi [1]; but in those cases the discussion turned on the language of Ss. 7 and 30 of the old Presidency Towns Insolvency Act (11 & 12, Vic. C. 21) whose language is wider than that of S. 16 (2) of the Provincial Insolvency Act of 1907. (As to the effect of Ss. 7 and 30 in the case of the insolvency of a sole surviving partner, see judgment of Justice Wallis in *Administrator-General of Madras* v. *Official Assignee of Madras* [2].) Even with reference to those cases, Sir Bhashyam Iyengar observed in *Nunna Setti* v. *Chidaraboyina* [3], that the managing member's power cannot be regarded as his *property* (within the meaning of S. 7) and that, if the matter were *res integra*, he should hesitate to hold that it was such a power as would pass to the Official Assignee under S. 30.

Dealing with a partnership of which an infant was a member, the House of Lords in *Lovell & Christmas* v. *Beauchamp* [4], held that a receiving order could be made only as against the adult partners, but the Lord Chancellor added, 'I think the receiver appointed under that order should also be appointed receiver of the partnership assets for the purpose of protecting them for the benefit of the creditors.' This decision is understood by White, C. J., in *Administrator-General of Madras* v. *The Official Assignee of Madras* [5] as supporting the view that without any separate suit for winding up the affairs of the firm, the Official Assignee can in virtue of the vesting order against a sole surviving partner, exercise in the course of the insolvency proceedings themselves, all the powers which such partner had over the partnership assets, for the purpose of making them available for the firm's creditors. In the Calcutta case under notice, it is suggested that the decision of the House of Lords does not support the view that the court can in the bankruptcy proceeding itself direct the receiver to deal with assets other than those belonging to the persons who have been adjudged insolvents ; and it is sought to deduce, from an examination of the course of proceedings in that case, that the direction to the receiver to deal with the *whole* assets of the partnership was made not in the bankruptcy proceeding, but in the appeal by the infant against the decree for money originally passed against the firm (on which the bankruptcy petition was founded). We are unable to see the connection between the appeal against a

1. (1896) I.L.R. 21 B. 205.
2. (1909) I.L.R. 32 M. at p. 465.
3. (1902) I. L. R 26 M. 214.
4. L. R. 1894 A. C. 607.
5. (1909) I. L. R. 32 M. 462.

particular decree for money and an order for a receiver to take charge of the partnership assets for the benefit of the firm's creditors generally. But even apart from this, we do not feel convinced as to the soundness of the explanation. After pointing out that the judgment should either have been against the adult partner alone or against the firm excepting the infant partner, the Lord Chancellor proceeds to say that if the judgment had been in either one or the other of these forms, a receiving order might have been properly obtained against the adult partner and 'in the proceedings in bankruptcy the partnership assets might have been made available for those who had given credit to the firm.' In the light of this passage, it is difficult to accept the explanation that the partnership assets were not meant to be dealt with under orders in the bankruptcy proceeding. In any other proceeding the assignee in insolvency could not claim or get anything more than the insolvent's *share* of the assets and the observations of the Lord Chancellor cannot fit in with that kind of remedy.

Jalandhar Thakur *v.* Jharula Das, I. L. R. 42 C. 244 (P.C.)

We cannot help wondering how the High Court held that the dismissal of the former suit by the widow to set aside the decree and sale on the ground of fraud barred the present suit by the reversioner to recover the property *in spite of* the decree and sale or, if he had to question them at all, to question them on grounds not available to the widow. However as the point was abandoned before the Privy Council—and, their Lordships say it was untenable and 'very properly abandoned'—it deserves no further discussion. On the question of limitation, their Lordships leave open the question of the starting point for adverse possession in cases in which a person holding a limited estate in a religious office alienates it and the alienee takes possession (*Cf. Pydigantam Jagannadha Row's Case* [1].) For the purposes of the case before them, it was sufficient to say that Art. 124 of the Limitation Act cannot apply to a case in which the defendant has not been discharging the duties of the office, but merely receiving the emoluments attached thereto; for in such a case the suit cannot be for 'recovery of the office.' This affirms the view taken by the Madras High Court in *Kamalathammal* v. *Krishna Pillai* [2],

1. (1904) I. L. R. 28 M. 197. 2. (1910) 20 M. L. J. 781.

and in effect disposes of the contention, sometimes urged on the strength of the Explanation in the 3rd Column of Art. 124, that the enjoyment of the emoluments must by itself be held to constitute possession of the office, so as to make Art. 124 applicable. One question that has often been raised is whether or not the continued enjoyment of the whole or a specific portion of the emoluments by a stranger, can by operation of the law of limitation lead to the dissociation of the emoluments (or portion thereof) from the office—and if so, when does adverse possession begin—so as after the lapse of a specified period, to bar future holders of the office from suing to recover such emoluments. In the particular case before their Lordships, the emoluments in question consisted of a share of the daily offerings, but they observe broadly 'By adversely taking and appropriating to his own use a share of the surplus daily income from the offerings, Jharula Das acquired no title and no right to a share of that income. On each occasion upon which Jharula Das received and wrongfully appropriated to his own use a share of the income to which the shebait was entitled, Jharula Das committed a fresh actionable wrong in respect of which a suit could be brought against him by the shebait.' We however doubt if this passage will justify the view that even in cases in which the emoluments consist of the income from specific immovable property (capable of *possession*) and a stranger takes possession of it and enjoys it, the shebait and in fact each successive shebait, will have a cause of action *de die in diem*, so as to exclude any question of adverse possession and extinction of title, through such possession, so far as the property is concerned.

Amulya Ratan Sircar v. Tarini Nath Dey, I. L. R. 42 C. 254.

The only question of general interest argued and decided in this case seems to be the applicability of the doctrine of estoppel as between the heir-at-law of the owner of a non-transferable holding and the devisee thereof from the owner. The learned Judges argue that there is no estoppel as between the testator and the devisee which can be said to bind the heir-at-law and that there is no principle on which an independent estoppel can in such circumstances

be held to arise as against the heir. We beg leave however to doubt if the decision of Justice Doss in *Hari Das* v. *Bairagi Udoy Chandra Das*[1] upholding a devise of the kind in question here really rests on the doctrine of 'estoppel' properly so called. We rather understand the learned Judge to proceed on the view that a transfer of an occupancy holding is valid and operative *as between the parties* (though not as against the landlord) that therefore the will is operative to divest the testator of his right in the holding, at the moment of his death and that the heir-at-law, who comes in by no superior or paramount title, can take only what is left of the testator's estate. The conclusion rests not on any rule of estoppel but on the theory of a *valid divestitive act*; and in this view it could make no difference whether the transfer was for consideration or not and whether it was *inter vivos* or by will.

---

1. (1908) 12 C. W. N. 1086.

NOTES OF INDIAN CASES.

Syed Ibrahim Saheb *v.* **Arumugathayee** : 38 Mad. 18.

"There is nothing to prevent the appellant," observe their Lordships in this case "from attacking only a portion of the decree, although the reason for the attack might cover the whole decree.". This may be a sound rule to lay down for to hold the contrary is to introduce a new kind of *res judicata* without any statutory warrant therefore on a theory of necessity to avoid conflicting judgments. But it has considerable authority in support of it. See *Ragunath Singh Manku* v. *Pareshram Mahata* [1], *Kandasami Chetty* v. *Annamalai Chetty* [2] *Kulai Kada Pillai* v. *Visvanatha Pillai* [3]. It was not necessary however to decide this point as their Lordships decided the appeal on a ground limited to the subject matter of the appeal. The ground that went to the root of the case, viz., whether the doctrine of subrogation will enable a party to use the extinguished mortgage not only as a shield but also as a sword, has since been decided in this Court so as to limit it to the former purpose, *Maharaja Pillai* v. *Narasimha Aiyar* [4]. The point decided is however no less interesting. Where a property subject to a mortgage is sold to the mortgagee for the mortgage amount and certain other sums and the purchaser is put in possession and enjoys the property, is it open to him thereafter to claim against the second mortgagee that he should be paid interest on his mortgage amount? Their Lordships say no. The point has arisen in several cases of sales in execution of the 1st mortgagee's decree and the Courts have, except in one case presently to be noticed, held that interest could not be recovered after the vendee takes possession of the property. *Dip Narain Singh* v. *Hirar Singh* [5], *Phulmani Chowdrain* v. *Nageshar Prasad* [6], *Gobandham Sastri* v. *Mahabir Singh* [7], *Raghunath Kunwar* v. *Shankare Singh* [8] and *Satnarain Tewari* v. *Sheo Baran Singh* [9]. None of these cases except the last discusses the ground on which they disallow interest to the purchaser. In the last named case, Mr. Justice Mookherjea thinks that the true ground is that the vendee's right being in his character as mortgagee, he is bound to account for the profits. This may be good enough

1. (1882) I. L. R. 9 C. 635.
2. (1914) I. L. R 28 M. 67.
3. (1904) I. L. R. 23 Mad. 339.
4. (1916) 2 L. W. 542.
5. (1897) I. L. R. 19 A. 527.
6. (1911) I. L. R. 33 A. 370.
7. (1912) I. L. R. 34 A. 323.
8. (1913) I. L. R. 36 A. 123.
9. (1911) 14 C. L. J. 500.

where the mortgage is a usufructuary mortgage, but where the mortgage is only a simple one, this argument loses all its force. In fact, in *Rangiah Chettiar* v. *Parthasarathi Naickar* [1], the mortgagee purchaser was disallowed the value of improvements effected by him on the ground that in his character as mortgagee, he was not entitled to be in possession and as such was not entitled to make or claim improvements. The true ground of the disallowance as pointed out by their Lordships in this case is this: subrogation is an equitable right and will be conceded only to the extent that justice requires. But we cannot agree that the analogies relied upon by their Lordships justified the conclusion that in the particular case the total disallowance of interest was justified. It does not seem to be correct to say that the plaintiff agreed to enjoy the profits for the whole money advanced by him. By the transaction, he got no doubt less of profits but he got absolute property; even as against the vendor, he can't be said to have given up his claim for more than the enjoyment of profits as it would certainly be open to him to sue his vendor for damages on the covenant for title. In *Ayathurai Ramtham* v. *Santhu Meera Rowthen* [2], their Lordships allowed the mortgagee purchaser the balance of contract rate of interest after deducting the profits. If the purchaser was only a usufructuary mortgagee previously, it might be the correct rule that the profits should be set off against interest and nothing more should be allowed. Where however the prior mortgage is a simple mortgage, the true equitable rule we should fancy would be to distribute the income between the mortgage money and the balance of the purchase money, and allow the mortgagee his interest at the contract rate deducting thereout the proportionate amount of profits. It should not be open however to the second mortgagee to call upon the first mortgagee purchaser to account for extra profits, if the profits should exceed the interest payable for the obvious reason that he has no claim against the purchaser of the equity of redemption for mortgage money on the ground that the latter has received the profits.

Sankararama Iyer v. Padmanabha Iyer: I. L. R. 38 M. 25.

The view taken in *Dulal Chandra Deb* v. *Ram Narain Deb* [3] and *Ramachandra v. Ganesh* [4] is as observed by Sadasiva Aiyar J.

1. (1896) I. L. R. M. 150. 2. (1907) 31 M. 253.
3. (1903) I.L.R. 31 C. 1057. 4. (1899) I.L.R. 23 B. 382.

more a criticism on the policy of the legislature in enacting S. 24, cl. 4, C. P.C. than a conclusion arrived at upon a consideration of that section and the sections of the Provincial Small Cause Courts Act. The effect of S. 33 of the latter is to constitute courts invested with Small Cause Jurisdiction into Small Cause Courts to the extent they exercise that jurisdiction. There is no conflict between cl. (1) a and cl. (4) of S. 24 C. P. C., because as has been repeatedly held in connection with the question of *res judicata* ordinary courts do not become by reason of S. 16 of the Provincial Small Cause Courts Act, incompetent to try suits of Small Cause nature. The legislature while leaving it to the Local Government to invest courts with Small Cause jurisdiction generally, apparently considered that the high status of the transferring authority afforded sufficient guarantee for the selection of a proper tribunal in individual cases where for reasons personal to the presiding officer (See S. 17 of the Madras Civil Courts Act) or connected with the case a transfer is deemed requisite.

Kamalabai *v.* **Bhagirathibai:** I. L. R. 38 M. 45.

We have the dictum of the Privy Council in *Ramachandra Martanda Waikar* v. *Vinayak Venkatsh* [1] that women succeed only by virtue of special texts, the full effect of which remains yet to be determined. Even applying that dictum, it is not very likely that the stepmother's right could be denied. She is a sapinda and her heritable right to the person that counts in tracing the heirs, viz., the father is recognised by the texts.

Krishnan Nair *v.* **Damodaran Nair:** I. L. R. 32 M. 48. This is but the righting of a wrong perpetrated by a long course of decisions out of deference to an obsolete theory. The reasoning of this decision is certainly fatal to the conclusion arrived at in *Govindan Nair* v. *Sankaran Nair* [2] but that also being a Full Bench decision, it will remain as one of the judge made anomalies of Malabar Law.

Naku Amma *v.* **Raghava Menon**, I. L. R. 38 M. 79.

This is as it ought to be; for otherwise, a member of the Tavazhi for whose benefit the property is given could not look for any benefit from the property and the income of the property

1. (1914) 27 M.L.J. 333 P.C. 2. (1908) I.L.R 32 M. 351 F.B., s.c 19 M.L.J. 350.

must be accumulated in the hands of the Karnavan. Observations in earlier cases as to the duty of the Tarwad Karnavan to maintain cannot be taken as negativing the duty of the Tavazhi Karnavan to provide it when called on to do so. As Mr. Justice Abdur Rahim says, the incidents of Putravakasam property have not been clearly defined and what will be the result of this process of definition whether it will approximate to ordinary joint property with impartibility, single management and corporate succession, or will develop a tarwad within a tarwad of which the great and arbitrary power of the Karnavan is the principal feature. A satisfactory result might be arrived at if in fixing the maintenance of the junior member from the tarwad property his Putravakasam property is left out of account and in fixing his maintenance from the Putravakasham property, his tarwad property is left out of account. The requisite of family residence as has been shown in *Marudevi's case* [1], is only a test of proper conduct and residence at the tarwad house might be taken as a valid excuse for absence from the Tavazhi house and *vice versa.* Mr. Justice Sankaran Nair thought that this Patravakasam was an anomaly and has referred the question to a Full Bench. If the Full Bench agrees with him and holds that Putravakasam property is taken by the donees only as partible property, courts will be relieved from all these speculations and we will have a plain rule instead.

Ramakrishna Chetty *v.* **Subbaraya Iyer,** I. L. R. 38 M. 101. The view taken in this case has since been affirmed by a larger Bench in *Rajah of Pittapur Gani Venkata Subba Row* [2]. There seems to be little difference of opinion as to the principle applicable, the difference being only as to its application to the case in hand. While one set of judges Mr. Justice Abdur Rahim, Mr. Justice Sankaran Nair and Mr. Justice Seshagiri Aiyar think that the section is perfectly clear, the other set of judges, the Chief Justice, their Lordships in this case, Mr. Justice Sadasiva Aiyar and Mr. Justice Kumaraswami Sastri think otherwise. Though the point is by no means clear, on the whole, we should think that the majority are right. The interval between the passing of the Act and its coming into force is too short to raise the presumption of an intention to interfere with vested rights of action. Having regard to the cases cited by their Lordships in this case, it is doubtful if

1. (1911) I. L. R. 36 M. 203, s.c. 22 M. L. J. 809. 2. (1915) 29 M. L. J.

the interval theory can be supported on authority. The introduction of a newf eature into the consideration of the question, namely, the interval between the passing of the Act in the Legislative Council and its receiving the assent of the Governor-General is hardly to be commended. The fact that the Act has interfered with vested rights in certain directions could not justify a general presumption to that effect. As for the language in S. 210, there is no difference between the language of that section and of S. 3 of the Limitation Act. It is not clear why these suits are not saved by S. 8 of the General Clauses Act. One aspect of the case referred to by Seshagiri Aiyar, J. but not referred to in the judgments of the other learned judges is about the Revenue Court's jurisdiction to entertain suits for rent for faslis prior to the Estates Land Act. It may be a question whether Revenue Courts have jurisdiction to try such suits at all, though the effect of the new act being not to take away *rights of action* but only to substitute a new forum with rights of appeal and second appeal, there does not seem to be anything against principle in holding that the new Act would apply to them so far as the forum is concerned. S. *Colonial Sugar Refining Company* v. *Irving* [1] but there could not be any question of option as to the tribunal, either the Revenue Courts have the jurisdiction or the Civil Courts but both cannot have it.

Kolathu Ayyar *v.* Ranga Vadhyar, 38 Mad. 114.

Already there is a conflict in this Court on this point. See *Avala Charamudi* v. *Marriboyina Raghavalu* [2]. All the arguments *pro* and *con* except one which we shall presently notice have been considered in these two cases. The question is one of election between what look like two equally tenable contentions. But may it not be argued that a contract which aims at the creation of a future interest contrary to S 14 of the Transfer of Property Act or the general rule of public policy is "of such a nature" that if permitted, would defeat the provisions of that law? An argument like this appears to have caught in *Jagannadha Raju* v. *Balasurya Prasada Rao* [3], where their Lordships held relying on S. 23 of the Contract Act that a contract which provided for the conveyance of a property when the defendant inherited it was bad.

1. (1905) A. C. 369.
2. (1915) 28 M. L. J. 471.
3. (1915) 28 M. L. J. 630.

Chinnayya v. Ramanna, I. L. R. 38 M. 203: 25 M. L. J. 228.

Though on the view ultimately taken by their Lordships the point did not directly arise, this case contains an elaborate discussion of the extent to which a decree may be set aside on the ground of fraud, if perjury by the decree-holder is one of the grounds recognised by law. Both in England and America there seem to be two distinct currents of authorities one in favour of and another against the view that it is a ground the one represented by *Abouloff* v. *Oppenheimer* [1], and the other by *Flower* v. *Lloyd* [2], and *Baker* v. *Wadsworth* [3]. *Abouloff* v. *Oppenheimer* [1], is followed in *Vadala* v. *Lawes* [4], not as being sound in principle but as binding authority. The American Courts regard *Abouloff* v. *Oppenheimer* [1], as proceeding upon grounds peculiar to foreign judgments. The reasons stated by James L. J. in *Flower* v. *Lloyd* [2], for the contrary view have hardly been met. Whether a party and his witness have been lying or are telling the truth is one of the questions necessarily involved in the determination of the questions in the case and in the absence of any wrongful act of the other side which has prevented the unsuccessful party from showing that his opponent has been lying to allow re-agitation of that question is seriously to impair the value of the principle of *res judicata.* Anyhow, Courts ought to refuse relief to parties who could by the exercise of reasonable diligence have prevented the fraud from being perpetrated and have failed to do so. (Cf. S. 19 of the Contract Act). We do not know if it is correct to say that relief on the ground of fraud is discretionary, it is perhaps more accurate to say that in the circumstances mentioned, it is not a case of a judgment which is the result of the fraud of the successful party but one to which his fraud is only one of the contributory causes along with the negligence or fraud of the other side. As pointed out by their Lordships in this case, there is a world of difference between a finding that the defendant had not made out the truth of his case as previously found and a finding that the defendant's case as found previously has not been proved to be true, a distinction which the Lower Courts in this case had failed to bear in mind.

---

1. (1882) 10 Q. B. D. 295.
2. (1878) 10 Ch. D. 327.
3. (1898) 67 L. J. Q. B. 301.
4. (1890) L. R. 25 Q. B. D. 310.

NOTES OF INDIAN CASES.

Biswambhar Shaha *v.* Ram Sundar Kaibarta, I. L. R. 42 C. 294.

With reference to Ss. 86 to 90 of the Transfer of Property Act, there existed a considerable diversity of judicial opinion as to the true nature of applications for 'order absolute' and for the supplemental decree (under S. 90) and as to the rule of limitation applying thereto. The state of decisions on the points can be realised from the cases referred to by Justice Mukherjee in *Purna Chandra Mandal* v. *Radha Nath Dass* [1]. The new Code has to some extent narrowed the field of difference, *viz.*, in so far as it has made clear that the applications in question are steps towards decree and not proceedings *in execution.* This has not however sufficed to settle the question of limitation in respect of such applications. It is no longer possible to rely on the argument urged in *Rahmat Karim* v. *Abdul Karim* [2], that these are not applications *under the Code of Civil Procedure.* But the Calcutta High Court nevertheless holds on general grounds that Art. 181 does not govern them. It seems to us too much to lay down as a general principle that no rule of limitation can apply to applications in a *pending* suit or to such as ask a Court to do what it has no discretion to refuse (Cf. *Madhabmani Dasi* v. *Lambert* [3]). Arts. 159 and 178, for instance, refer to applications in pending suits; and the Court has no more and no less discretion to refuse an application for an order absolute or for a decree under O. 34, R. 6, than it has in respect of any application for execution. The principle of decisions like *Kylasa Gounden* v. *Ramasami* [4], seems to us to be only that no rule of limitation can apply to matters in respect of which no application by the parties *is required under the law* or the Court is expected to act *suo motu.* This cannot be said of the matters now in question. The Calcutta cases recognise the expediency of having some time limit in respect of such matters, but they prefer to find it in the Equity rule against laches. As against this it has to be remembered that the scheme of the Indian Limitation Act, is to provide definite periods of limitation rather than follow the English Equity practice—*Cf.* the

1. (1906) I.L.R. 33 C. 867 at pp. 875, 876.
2. (1907) I.L.R. 34 C. 672.
3. (1910) I.L.R. 37 C. 796.
4. (1881) I.L.R. 4 M. 72.

decisions relating to specific performance suits—and it is undesirable to fall back upon an indefinite rule based on 'laches' when the language of Art. 181 is clear and wide enough to cover the particular case. We think the view of the Madras High Court in *Thathara Nannabhu Chetti* v. *Kuppal Krishnammal* [1], and *Rama Venkatasubba Iyer* v. *Shanmukham* [2], is more in accordance with the policy of the Act. For the Bombay view, see *Datto Atmaram* v. *Shankar Dattatraya* [3].

Hirji Khetsey & Co. *v.* **B. B. and C. I. Ry. Co.**, I. L. R. 39 B. 191.

In view of the practical certainty of the case going up before higher tribunals, we do not propose to discuss at any length the question of law arising in this case. *Re ipsa loquitur* is a well known rule; but the true scope and limits of the maxim are by no means easy to fix; and in India, a further complication is introduced by the difference in liability made by S. 72 of the Railways Act between Railway Companies and other common carriers. It is however clear that both under the general law as to bailees and under the terms of S. 76 of the Railways Act, when the loss or destruction of goods entrusted to a Railway Company is proved, the *onus* lies on the Company to prove the circumstances necessary to exonerate it from liability. For this purpose, the difference in language between S. 9 of the Carriers Act and S. 76 of the Railways Act seems to involve no change in the law. The question as to what the Company must prove to relieve itself from liability is attended with greater difficulty and it is particularly so in cases in which it is not possible to ascertain the cause of the loss: of course the amount and quality of proof requisite cannot be laid down as a matter of law; but there can be no doubt that the mere fact of loss and the Company's inability to assign the cause thereof are not by themselves *necessarily conclusive* as to liability. It will be still *open* to the Company to prove that it has taken as much care of the goods as a man of ordinary prudence would take of his own goods, under similar circumstances, etc. To this extent we see no conflict between the decisions in

1. (1913) 14 M. L. T. 314. 2. (1913) M. W. N. 867.
3. (1914) I. L. R. 38 B. 32.

The River Steam Navigation Co. v. *Choutmull Dogur* [1], *Lakhichand* v. *G. I. P. Ry. Co.* [2], and the case under notice. We are unable to see the exact point on which Beaman, J., seems to find himself unable to agree with Mr. Justice Batchelor as to the interpretation of the decision in *The River Steam Navigation Co.'s Case* [1]. Reference seems to be made by Batchelor, J., to the discussion of the evidence by the Judicial Committee, not to detract from the weight of any presumptions arising from the fact of the loss being unaccounted for, but only to answer the argument that this circumstance by itself was conclusive as to the defendant's liability. And in holding that the presumption was rebutted, he relies not merely on the evidence as to the care *generally* taken by the company, but as to their carefulness *in respect of the plaintiff's goods.*

Kashinath Parasram *v.* **Gouravabai**, I. L. R. 39 B. 245.

We agree that the demand by banks and companies, of probate or letters of administration even in respect of joint family properties passing by survivorship 'has led in practice to a great deal of theoretical absurdity.' But we do not think that there is anything in law which necessitates the levy of court fee in respect of the *whole* of the joint family property dealt with by a will whereof probate is sought. The *absolute* exemption allowed in *In the goods of Pokurmull Augurwalla* [3] and *Collector of Kaira* v. *Chunilal* [4] is not easy to justify in view of the principles now well established as to the availability of a member's share for his own personal purposes. These cases have been sufficiently commented upon in *In re Desu Manavala Chetti.* [5] and the view of the Madras High Court that court fee is payable in respect of the *share* of the testator seems to us reasonable. It is misleading to rely too much on the well-known observations in *Appovier's case,* as though they contain the *whole* law as to the rights of undivided members. A great deal of water has since flowed under the bridge. But curiously enough the learned Judges in the case under notice rely on that case as justifying the levy of court fee on the whole property. Hayward J. says 'what has to be looked at in such cases is the estate actually specified in the will and not the estate which could legally be disposed of by the will.' This

1. (1898) I. L. R. 26 C. 398.
2. (1911) I. L. R. 37 B. 1.
3. (1896) I. L. R. 23 C. 980.
4. (1904) I. L. R. 29 B. 161.
5. (1909) I. L. R. 33 M. 92.

is true; but it does not follow that 'those desiring to establish the factum of the will must pay the full duty leviable' on the property dealt with by the will, unless one accepts the learned Judge's view that it cannot be said of even the least part of the joint family property that it is held by a member 'in trust not beneficially'. We beg leave to point out that there is some confusion underlying this last proposition. It is one thing to say that every member of a joint family has a beneficial interest in every item of joint property; but it is a very different thing to say that a member is so interested in such an item to the *full* extent of its value. It is the latter question that now concerns us. It may be said that some cases countenance the upholding of an alienation by a member of the *whole* of some item of family property, but those very cases clearly proceed upon a principle of special equity in partition, without derogating from the rights of the other members.

There is however one circumstance—not adverted to in any of the cases—which may introduce some complication in the decision of the question of the court fee payable in such cases. As a matter of fact, the joint family consisted of *father and son* in the case under notice as also in the Madras Full Bench Case; but a difference is conceivable between such cases and those where the family consists of undivided *brothers.* In the latter case it can be reasonably held that the deceased brother held the other brother's share without a beneficial interest or general power to confer a beneficial interest, but in the former case, such a view will conflict with decisions like *Fakirchand Motichand* v. *Motichand Hurruckchand* [1], *Jagabhai Lalubai* v. *Vijbukhandas*[2] and *Nunna Setti* v. *Chidaraboyna* [3] holding that the *whole* interest in the family property can be attached or will vest in the Official Assignee in proceedings against the father, for these cases rest on the ground that over the whole ancestral property the father has a disposing power which he may exercise for his own benefit. The recognition by the Legislature in S. 53, C. P. C. that as between father and son, family property may for purposes of execution be regarded as property come to the son, as 'legal representative' would emphasise the distinction.

1. (1883) I. L. R. 7 B. 438. 2. (1886) I. L. R. 11 B. 37.
3 (1902) I. L. R. 26 M. 214.

Abkar Saheb *v.* **Sonan Bivi Saiba Ammal**: I. L. R. 38 M. 261.

One of the points decided in this case is covered by *Saminatha* v. *Purushothama*,[1] that is to say that the expenses of a suit in which a person posing himself as a trustee unsuccessfully resists another's right to be trustee is not a proper charge on the trust estate. The other point that arose in the case *viz*, the limitation for a suit to enforce a trustee's right to indemnity out of the trust estate for his out of pocket expenses is also covered by authority *Peary Mohun Mukerjee* v. *Narendra Nath Mukerjee*[2]. An attempt is made to explain the basis of their Lordships' decision. Mr. Justice Miller thinks that art. 132 is inapplicable because the third column of that article cannot apply as no suits could be maintained at the time the amounts were due for want of a person to be sued. We think this is a sound argument. For the same reason art. 61 is also to be excluded. It is a well-settled principle of law that when the hand that pays and the hand that is to receive is the same limitation does not run. There is precedent for the liberty taken in the decisions with reference to art. 182 of the Limitation Act. Mr. Justice Sadasiva Aiyar bases it also on the peculiar nature of the charge. In this too there is considerable force. A further question that arose in the case and that a more difficult question was as to when limitation commenced. Was it at the date when the trusteeship came to an end, or when it was declared by the Court to have come to an end or when the possession of the trustee terminated? Their Lordships say that at the earliest it could be only at the second of the dates mentioned. Both were inclined to hold that it would be the later date when possession ceased. The ground of their Lordships' decision is the nature of the charge sought to be enforced. The right to actively enforce the charge in their Lordships' opinion arises only when the trustee is unable to himself have reimbursement out of the trust funds. An analogous rule is laid down by their Lordships of the Privy Council in respect of persons in possession under decrees of courts subsequently reversed. *Sakhina Mohun Roy* v. *Saroda Mohun Roy*[3].

1. (1892) I. L. R. 16 M. 67. 2. (1909) I.L.R. 37 C. 229 (P. C.)
3. (1893) I. L.R. 21 C. 142.

The judgment of Mr. Justice Sadasiva Iyer contains some instructive observations as to *de facto* trustee's right of reimbursement. His Lordship makes a distinction between a *de facto trustee in bona fide possession and one wrongfully* in possession and also a distinction between payments out of the income and out of pocket expenses. The distinctions made by his Lordship are fully justified by analogies drawn from cases of executors *de son tort* and trespassers against whom a decree for mesne profits or damages is made. See *The Peruvian Guano Company* v. *Dreyfus brothers* [1] *Dakhina Mohan Roy* v. *Saroda Mohan Roy* [2] and Williams on Executors p. 195. The rule that an executor *de son tort* has all the rights but none of the privileges applies only to the right of retainer and other special rights of the executor and "*plene administravit*" is always a good defence to an action against him. In this country where *de facto* trustees, *de facto* matadipathies, for the matter of that *de facto* poligars even are recognised, there is little reason not to give effect to rules of *Common Justice* to which their Lordships of the Privy Council refer in *Dakhina Mohan Roy's case.*

Vairavan Chettiar *v.* **Avicha Chettiar :** I. L. R. 38 M. 275.

A contract implied in fact is not an implied contract but an express contract; the term implied contract is properly applicable only to contracts implied in law. S. 9 of the Contract Act gives only the definition of an implied promise and not of an implied contract. In the absence of any binding definition of an implied contract, the term may properly be understood in the sense of the English Law under which warranty of authority is such implied contract. The expression misfeasance or malfeasance in Art. 36 is wholly inappropriate to such action. Having regard to the fact that the articles of the limitation Act are enacted with special reference to actions as known to English law, it seems to be a fair conclusion that the term implied contract was intended to include implied warranty of authority.

---

2. (1892) A. C. 166. 3. (1898) I.L.R. 21 C. 146.

Muthukrishnier *v.* Veeraraghava Aiyar, I. L. R. 38 M. 297.

Though there is much to be said on principle in support of Mr. Justice Sundara Aiyar's judgment, after the recent decision of the Privy Council in *Mulraj* v. *Viswanath* [1] the point seems unarguable. According to the view of their Lordships of the Judicial Committee hypothecation is an assignment within the meaning of S. 130 Transfer of Property Act. If so, the assignee has the right of suit and the assignor has not. Mr. Justice Sundara Aiyar does not deny that the creditor would be liable if the assignment was one that precluded the other party from suing for well he could not do that in the face of *Shyan Kumari* v. *Rameswar Singh* [2]. No doubt the implication of this view goes further than *Muthuvijia Raghunath* v. *Venkatachellam*[3] would require, and it may be open to argument whether their Lordships' decision does not require the same conclusion as to the incapacity of the mortgagee to sue after a sub-mortgage. Of course, S. 130 does not apply to mortgage-debts and the question will have to be decided on the general principles referred to in *Muthu Vijia Raghunatha Ramachandra Vacha Mahali Thurai* v. *Venkataehellam Chetti* [3].

The Receiver of the Nidadavole *v.* Suraparazu, I. L. R. 38 M. 295.

This case illustrates the general inconvenience of peripatetic Courts but happily, the particular inconvenience can be avoided by the Collectors taking a little thought and naming a person to receive the plaints.

Muthia Chetti *v.* Suppan Servai, I. L. R. 38 M. 291.

There is nothing violent in holding that "the date of the passing of the decree" is the date on which it is drawn up. The provision of the Civil Procedure Code that the decree shall bear the date of the judgment is not tantamount to saying that the decree is for all purposes made on that date. In *Annamalai* v. *Clocte* [4] it was held that the date of an order was the date of its

1. (1913) I. L. R. 37 B. 198.
2. (1895) I. L. R. 22 C. 27.
3. (1904) I. L. R. 20 M. 35.
4. (1883) I. L. R. 6 M. 189.

being communicated. Applying the principle of that judgment, the date on which the decree can be said to be passed is the date on which the party could have a copy of it, *viz.*, the day on which it is drawn up. Having regard to the practice of Courts actual communication could not be expected.

Muthusamier v. Sree Sreemethamithi Swamyar, I. L. R. 38 M. 356.

This case taken with *Narsaya Udapa* v. *Venkatramana Bhatta* may be taken as settling the law that whereas in the case of improper alienations of trust property, limitation commences to run from the date of alienation, in the case of such alienations by Matadhipathis who have a beneficiary interest in the property, limitation commences only after the death of the grantor and may be put off for the life-time of the successor if he should ratify the alienation. In the absence of such ratification, failure to sue within the statutory period after the accession of the new incumbent may bar the institution itself.

We welcome the timely caution uttered by Sadasiva Aiyar, J., against the blind application of a foreign analogy to these institutions which is more likely to obscure than elucidate their true import. Whether S. 92, C. P. C. applies or not, it will be a grave national calamity if the Courts should be held not to have the power to prevent gross scandals in the administration of the affairs of these institutions. There is no reason why the body of disciples for whose benefit the institutions are obviously intended should not in that eventuality, intervene by suit cf. *Strinivasa Ayyangar* v. *Strinivasa Swami* [1]. *Kailasam Pillai* v. *Nataraja Thambiran* [2].

---

1. (1892) I. L. R. 16 M. 31 at 33. 2. (1909) I. L. R. 33 M. 286.

NOTES OF INDIAN CASES.

Monijan Bibi *v.* District Judge, Birbhum, I. L. R. 42 C. 351.

The powers and functions of the Court, under Act VIII of 1890, in respect of the marriage of a ward are by no means easily ascertained. Under no system of law does the court act as match-maker; but there is nothing in the Indian Act which even requires that a ward should be married only with leave of the court. In *Bai Diwali* v. *Motikarson.*[1] one of the learned Judges doubted whether S. 43 of the Act can cover a direction by the court to the guardian in respect of the ward's marriage (but see *Subhadra Koer* v. *Dhajadhari* [2]). It is sometimes suggested that the 'other matters, &c.' in S. 24 may include the marriage of the ward, *Komma Somakka* v. *Pedda Ramiah* [3]—though in the case under notice the learned Judges are not prepared to take that view; but any way, that section only prescribes the duties of the guardian of the person and throws no light as to the power of the court. S. 33 provides for the 'opinion, &c., of the court being obtained by the guardian, only as to 'the management or administration of the property of the ward.' S. 34 (e) directs that the guardian of the ward's property shall under the orders of the court apply the income thereof for the celebration of ceremonies, &c. This seems to be the only way by which the Court in India can exercise any control in the matter of the ward's marriage; and we are therefore unable to agree—whatever the 'desirability' of the court's sanction may be—that in this country 'a ward of court cannot marry without the consent of the court.' We doubt the propriety of importing the rules of English law—however elementary or fundamental—in the face of the omission of the Legislature to reproduce them. It is scarcely necessary to say that the enforcement of the English rule in this country will not be without its difficulties and complications. In the case of persons whose estate is under the Superintendence of the Court of Wards, there is express statutory provision on the point.

Kanchan Mallik *v.* Emperor, I. L. R. 42 C. 374.

In this case the learned Judges lay down and if we may say so, rightly that in criminal cases, where a general appeal (and

1. (1896) I. L. R. 22 B. 509.
2. (1911) 15 C. L. J. 147.
3. (1911) 2 M. W. N. 519.

not merely a limited one) is allowed by the law, it is the duty of the Appellate Court, as much as of the court of first instance, to be satisfied 'affirmatively that the prosecution case is substantially true and that the guilt of the appellants has been established beyond all reasonable doubt.' It is not proper for the Appellate Court to say that it must accept the conclusion of the trial Court unless the accused is able to establish to its satisfaction that the first court has come to a wrong conclusion. The question is one of far-reaching importance; and analogies drawn from other systems of law under which there is practically no appeal on 'facts' or where the appellate Court is only a 'court of error' cannot be safely relied on. Even with reference to Indian procedure, a number of dicta of high authority may be found to support the theory that an appellate tribunal should not reverse the decision of the Subordinate Court unless it is satisfied that the decision is wrong and not merely on the ground that the former would itself have come to a different conclusion if the case had come before it in the first instance. Such observations, whatever their soundness, relate generally to civil litigation and cannot with propriety be extended to criminal procedure.

Ram Ranjan Roy *v.* Emperor, I. L. R. 42 C. 422.

We would invite particular attention to the observations of Jenkins, C. J., in this case as to the duty of a Public Prosecutor in the conduct of criminal cases. If, as he says, the duty of a Public Prosecutor is to represent not the police but the crown, what should be the attitude of the court? When will the subordinate criminal courts in India effectually clear themselves of all suspicion on this score? We are greatly indebted to the learned Chief Justice for tracing out a remarkable mistake in the report of Sir Arthur Wilson's remarks in *Empress* v. *Dhuno Kasi* [1]. None can help regretting a state of things which should have led Sir Lawrence Jenkins to feel that the treatment of assessors by Sessions Judges in the mofussil is not infrequently anything but commendable.

Abdul Hakim Chowdhury *v.* Hemchandra Das, I. L. R. 42 C. 483.

As illustrated in this case, the language of O. 47, R. 7 C.P.C. is such as to afford room for the argument that the granting of a

1. (1881) I. L. R. 8 C. 121.

review in contravention of O. 47, R. 4, can be taken exception to only by way of an appeal (whether from the order or from the final decree) to a higher court and not before the very court which granted the review. So far however as proviso (a) in rule 4 is concerned, *viz.*, that a review should not be granted without notice to the other side, any contravention thereof will give rise to an objection *not on the merits* but as to the form of procedure and in view of well established principles of procedure, we agree that the objection (as to want of notice) may be taken in the very court which granted the application for review. It may be pointed out in passing that the language of O. 47, r. 7 is not quite appropriate with reference to cl. (*b*), for in the class of cases covered by it, the objection is not that the *application* is in contravention of rule 4 but that the *admission* of the review is in contravention thereof. This was the language of S. 629 of Act XIV of 1882, but when changing it in the Code of 1908, the inappropriateness seems to have escaped notice.

Upendra Nath Kalamuri *v.* **Kusum Kumari Dasi**, I. L. R. 42 C. 440.

There can be no doubt that the question of the 'extent of liability' is different from that of 'legal capacity.' If certain properties alone of a person are liable for a debt, but not his other properties, it does not follow that he holds them in two different 'capacities.' Take a joint Hindu family. A junior member may be liable for debts incurred by the manager only to the extent of his interest in the family properties; that does not mean that he holds his separate properties in a different legal capacity. They are both his own. So also in the case of an infant partner. Likewise, the differentiation, in the case of a legal representative, between assets derived from the ancestor and properties of his own, is unconnected with any difference of legal character as to the ownership of the two kinds of properties and cases like *Punchanun* v. *Rabia Bibi* [1] have therefore rightly held that the question of the liability of particular property for a particular debt is one between the parties (or their representatives) within the meaning of S. 47 C.P.C. A case of trust stands on a different footing, involving a well known distinction in legal capacity, not merely for purposes of 'liability' but in other respects as well.

1. (1890) I. L. R. 17 C. 711

The relation of a trustee to the trust property is fundamentally different from that in which he stands towards his own property. Hence it is that numerous cases have held that where property alleged to belong to a trust is attached in execution of a decree for a *personal* debt due by the trustee (or *vice versa*), the question of the liability of the property for the particular debt is not one between 'the parties to the suit'. We think there is really no conflict between the two classes of cases; the solution suggested by Justice Beachcroft in this case accords in effect with the distinction pointed out above but the test as laid down by him is perhaps empirical rather than legally correct.

Karmali Abdulla *v.* Karimji Jiwanji, I. L. R. 39 B. 261 (P.C.)

A question may be raised ere long whether in view of the observations of the Judicial Committee in this case, decisions like *Somasundaram* v. *Krishnamurti* [1], and *Kutte Ammu* v. *Purushotam Dass* [2], can be unreservedly accepted. In the Madras cases, a decree against the partner who did not join in the promissory note was refused, even on the footing that the advance was made on account of the joint trade. After holding that the non-executant partner was not liable *on the note*, the learned Judges in the earlier case proceed to say, 'we think there is no evidence of any intention to create any liability otherwise than under the note and that where money is advanced in consideration of a promissory note, it cannot be treated as giving rise to a suit for money lent, independently of the note.' If these remarks are to be broadly interpreted as negativing the liability of the partners in all cases in which one partner becomes indebted under a negotiable instrument which does not on the face of it bind the other partners, it may be difficult to reconcile them with the decision under review. The case is of course treated by their Lordships as being 'truly an action of accounting' and not 'purely a question of liability on the bills.' But the initial liability arose out of Hundis drawn by one of the partners and the Judicial Committee rest their decision on the finding that 'the plaintiff paid and advanced moneys on the Hundies for and on account and for the credit of the partnership.'

---

1. (1906) 17 M. L. J. 126. 2 (1910) 21 M.L.J. 526.

NOTES OF INDIAN CASES.

Srinivasa Aiyangar v. Tiruvenkatathaiyangar I.L.R. 38 M. 556.

Several points of interest arose in this case though on one point there was a difference of opinion.

One question that arose for decision was; when there is a partition between brothers, and sister's marriages are to be provided for, whether all the family properties can be charged therewith or only the self-acquired property of the father. On all principles known to Hindu Law, a distinction between the property of the father and the grandfather seems to be untenable. Though for some purposes there is a difference between them, they are really not different species of property, there are no separate rules of inheritance for them. Though the Mitakshara does make a difference between पैतृकद्रव्य and पैतामह द्रव्य there is nothing to indicate that the injunction in question is restricted to the former; on the other hand the context abundantly shows that the contrary is the case. The Samskaras have to be performed out of the *Samudaya Dravya*, the joint property.

The next question was as to the step-mother's maintenance, as to whether it should be charged only on her son's share or on the whole property. Assuming that the step-mother is not entitled to a share under the text there does not seem to be any answer why as widow of a co-sharer, her maintenance should not be charged on the entire family property. Viramitrodaya which does not include step-mothers among mothers provides for their maintenance under the text relating to maintenance of widows.

But both the Smriti Chandrika and the Sarasvati Vilasa include step-mother among mothers in the text providing for shares to mothers. Those are the commentaries on whose authority a mother's right to a share is cut down to maintenance in this Presidency. The Mitakshara also is understood by the Viramitrodaya to include step-mothers among mothers.

Mr. Justice Sundara Aiyar also does right in pointing out the distinction between the right to account and the right to mesne profits. A minor co-parcener might be entitled to ask the manager as to how he dealt with the family funds which an adult by reason of his presumed participation and acquiescence may not be entitled to; but that cannot give him any right to claim mesne profits.

The other question that arose in the case on which the judges differed was as to whether marriage expenses of the unmarried brothers should be provided for at the time of partition. On this point, reading the texts as they stand, there seems to be little justification for the narrower construction. Neither the text of Yajnavalkya nor the commentary of Vigneneshwara thereon makes any distinction between Samskaras. असंस्कृता भ्रातर समुदायद्रव्येण संस्कर्तव्या: The texts of Brihaspati and Vyasa relied upon by Smriti Chandrika expressly refer to Samskaras other than Upanayanam. Really, there seems to be little justification in Smriti Chandrika for the view that Upanayanam is the only Samskara to be compulsorily provided for out of the family funds. The restricted interpretation the author places on the word *Samskaras* is confined to the text of Narada which casts a duty on the brothers to perform them irrespective of the possession of property. This is how Mr. Krishnaswamy Aiyar, the translator of Smriti Chandrika understands the author (p. 59). The right view to take of these texts is that provision should be made for all the Samskaras which are usually done apart from any question as to whether their performance is compulsory.. Cf. 2 Strange 289. If ones' sense of fairness has anything to do in the matter, it certainly seems equitable that a man who has had the benefit of the family funds for his own marriage should not be permitted to tell his brother that his marriage is not compulsory; that he may with great advantage to his soul be a नैष्ठिकब्रह्मचारि or a सन्यासि (Naishtika Brahmachari or Sanyasi). As Manu says प्रवृत्तिरेषाभूतानां निवृत्तिस्तुमहाफला. (Chapter V, 56). It is natural to marry but may be meritorious not to. But no man has got a right to ask another to perform meritorious acts for his own benefit.

Chidambara Chettiar *v.* **Vaidyalinga Padayachi**: I. L. R. 38 M. 519.

Having regard to the decision of the Full Bench in *Kurri Veera Reddi* v. *Kurri Bapi Reddi* [1] it would seem impossible in this High Court to contend that a transaction which requires for its validity a registered deed can be validated on the ground of possession being delivered or money paid. Both those circumstances did exist in the case referred to, and yet the Full Bench

1. (1906) I. L. R. 29 M. 836.

held that the vendor was entitled to recover the land. *Ram Baksh* v. *Mughlani Khanam* [1] and *Karalia Nanubhai* v. *Mansukhram* [2] proceed upon a view opposed to the Full Bench decision. The effect of the Full Bench is that there is no scope for the application of the Equity doctrine of estoppel or part performance in cases where the statute requires a deed for completion of title. Those doctrines may yet be successfully appealed to in cases where the Statute Law does not require a deed. Cf. *Mahomed Musa* v. *Aghore Kumar Ganguli* [3]. Not that in some cases a question of estoppel as understood in the Evidence Act may not arise but no estoppel will arise merely from the fact that consideration has been paid for or restitution in *integro* is not possible. It is difficult to see how in transactions entirely void under the law, any question of restitution can arise. To apply S. 55 to transactions in the nature of exchange is to confuse legal ideas and can in no view be justified, but even in the case of that section, there can be no scope for its application when the transaction is void.

Krishnappa Chetty *v.* **Abdul Khader Saheb**, I. L R. 38 M. 535.

The point that arose in this case is one of first impression and involves an extension of the doctrine of *lis pendens* as hitherto understood. We must confess we feel great difficulty in accepting the conclusion as correct. If on the one side, the analogy of appeal, *Setappa Goundan* v. *Muthaya Goundan* [4], and execution proceedings, *Umesh Chandra Sarkar* v. *Jahur Jatima* [5], are ready to hand, on the other, with even a greater show of reason, the analogy of review might be appealed to in support of the contrary view, Huken Chand *Res judicata* S. 278. It seems to us difficult to make the claim *proceedings* and the *suit* subsequently brought, one proceeding within the meaning of S. 52 of the Transfer of Property Act. The section makes a difference between a suit and a proceeding. Unless the proceeding is a proceeding in the suit as in the case of execution proceedings, it would *prima facie* seem impossible to treat the *proceeding* and *suit* as one and the same *proceeding*. The hardship for which the somewhat heroic remedy is suggested is

1. (1900) I. L. R. 26 A. 266.
2. (1900) I. L. R. 24 B. 400.
3. (1914) 28 M. L. J. 58 (P. C.).
4. (1908) I. L. R. 31 M. 268.
5. (1891) I. L. R. 18 C. 164 (P. C.).

one of frequent occurrence compares for instance arts. 11 and 47 to which obviously the principle of *lis pendens* will not apply.

Venkatapathi Nayanivaru *v.* **Mahomed Sahib**, I. L. R. 38 M. 531.

We think the law has been correctly laid down in this case as to a Judge's disqualification to hear cases. The mere fact that the appellate Judge had when he was Munsiff, tried the case in part could not be a disqualification for his hearing the appeal unless the appeal involved any question as to the correctness of the orders passed by him as trial judge.

Kunhu Kutti Amma *v.* **Mallapratu**, I. L. R. 38 M. 527.

If the decision in the case is based on custom, on which one of the learned judges that decided the case is undoubtedly a great authority, *cadit quaestio* ; but if the case is based on any analogy drawn from the Malabar Law, there seems to be good reason to doubt its correctness. It is now established that the Nambudris are governed by the Hindu Law except in so far as it is modified by usage. There is still much vague talk about the peculiarities of Nambudri Law as if it is a *genus* apart. It is one of the old fallacies which die very hard. Granted impartibility, there seems to be little to differentiate it, we do not say this or that School of Hindu Law, but from Hindu Law. A careful analysis of the case in *Vasudeva* v. *Secretary of State for India* [1], will show that this is all what remains of the so-called peculiarities of that law. Neither single managership nor management by the oldest member is a peculiarity of that law. Usage as to marriage by the eldest member alone has since been declared to be merely a social practice and will not preclude the junior members from marrying *Poppi Antarjanam* v. *Jeyyan Nair* [2]. The Kritrima and Dwamushyana forms of adoption and affiliation by women though opposed to the law as extant in the other parts of this Presidency cannot be said to be opposed to Hindu Law and in fact are in accordance with the views held by some other School of Hindu Law. It has also been recently held that the self-acquired property of individual co-parceners descends on their heirs under the Mitakshara law and not on the Illom *Vishnu Nambudri* v. *Akkamma* [3]. Women are said to possess larger

1. (1887) I. L. R. 11 M. 157. 2. (1903) 14 M.L.J. 214.
3. (1910) I.L.R. 34 M. 96.

rights than in other parts of India but the exact scope of those rights have not yet been determined and if they, as a matter of fact, possess them, that would be going back to the old Hindu law. Neither *Nilakandan* v. *Madavan* [1] nor *Govindan* v. *Krishnan* [2], proceeds upon any determination of the customs governing the parties. *Govindan* v. *Krishnan* [2] simply states the fact that there would be no scope for the application of the doctrine when there are brothers of the deceased. There is little analogy between the position of the father and the Karnavan. The person who resembles the Karnavan would be the manager of the Illom or the ordinary Hindu family who is not the father. In neither case is there any pious obligation to pay debts though the rule long stuck to in Malabar that the Karnavan's debt is presumed to be for a binding purpose would if accepted by the High Court have approximated the Malabar Law to Hindu Law as to liability for father's debt. It is difficult to see how the non-liability of the Anandravan for the debts of the Karnavan could furnish useful analogy to justify the exclusion of the *pious* obligation of the son under the Smritis which are as much a subject of veneration to the Nambudris as to the other Hindus. It is quite another question whether this so called civil liability for the debts of the father based on pious obligation is not a creature of judge made law and should not be applied to Nambudris.

The Manager to the Lessees of Sivaganga Zemindari *v.* Chidambaram Chetty, I. L. R. 38 M. 524.

Where the landlord is entitled to collect so much per acre the mere fact that owing to inadvertence, or owing to less scientific methods of survey, he collects less, cannot disentitle him from collecting the proper amount without recourse to the Collector under the provision for enhancement of rent.

Koneti Naicker *v.* Gopala Ayyar, I. L. R. 38 M. 482.

It can by no means be said that a contrary conclusion was not possible in this case. "Signing as agent" and "Executing as agent" cannot make much difference in meaning and it cannot be said that if it were a bond and not a pro-note, a contrary conclusion would not have been reached. Under the English law, there seems to be little difference on the point in question

1. (1887) I.L R. 10 M. 9. 2. (1892 I.L.R. 15 M. 383.

between bonds and pro-notes. But nevertheless, for the sake of uniformity and having regard to the other considerations referred to by Sadasiva Aiyar, J. we are glad that the conclusion was as it is.

Govinda Chetti v. Perumal Chetti, I. L. R. 38 M. 489.

The remarks of Sadasiva Aiyar, J., are none too severe against the practice adopted by some Magistrates of using S. 144 Criminal Procedure Code, in such a way to give themselves a more extended jurisdiction than the Code permits.

Phetma Bibi v. Haji Musa Sahib, I. L. R. 38 M. 491.

This case contains a very luminous exposition by Tyabji, J., of the rules of Mohamedan Law as to succession to Mutwalliship with special reference to hereditary right, but the remarks of Sadasiva Aiyar J. might raise certain amount of alarm among vested interests by his Lordship's strong expressions of opinion against the hereditary principle in the matter of succession to religious offices: There is much to be said for the point of view suggested by his Lordship.

Battie v. Brown, I. L. R. 38 M. 452.

It is certainly an anomaly to hold that though the marriage is dissolved, it is still in force but some such construction was necessary to avoid an *impasse*. A dissolved marriage which invalidates a subsequent marriage is, in a sense, "still in force."

Lodd Govindoss Krishna Doss v. Rukmani Bai: I. L. R. 38 M. 438.

Qui facit per alium facit per se is, no doubt the ordinary rule, but when the section expressly says that the entry should be in the handwriting of the person who makes the payment, there seems to be little scope for the application of this maxims. The utmost concession that is permissible under the circumstances, if at all is that allowed by the Judges, *viz.* when the man is unable to write, he may fix his mark, which is all he can do towards making the entry of payment.

NOTES OF INDIAN CASES.

Channmal Sawmi *v.* **Gangadharappa,** I. L. R. 39 B. 339. (F. B); **Bharma** *v.* **Bhama Gauda,** I. L. R. 39 B. 421; and **Municipal Committee of Nasik** *v.* **The Collector of Nasik,** I. L. R. 39 B. 422.

The opinion of the Full Bench in the first case is disappointingly laconic. The learned Judges content themselves with a negative answer, that decisions on certain points are not preliminary decrees, within the meaning of S. 97, Civil Procedure Code, so as to necessitate an immediate appeal therefrom; they give us no indication of their opinion as to what cases are covered by that section. It has been held in cases like *Kaluram* v. *Gangaram* [1] that there can be no appeal unless a decree is drawn up. (see however *Govind* v. *Vithal* [2] and *Kamini Debi* v. *Promotha Nath* [3] for a different view) and we think, with the referring Judges, that the Legislature has indicated the classes of cases in which a preliminary decree is to be passed. Presumably, as held in the third case noted at the head, these are the cases contemplated by S. 97. A 'preliminary decree' should not be confounded with a decision on a 'preliminary point.' If such a point is decided in favour of the plaintiff, the Court next enters on the merits of the case and there is no decree of any kind at this stage. If on the other hand a preliminary point is decided against the plaintiff so as to bar the further trial of the suit, a decree of dismissal follows and this is a 'final' decree.

Now that the Bombay High Court has gone back upon the dictum in *Narayan Balkrishna* v. *Gopal* [4] as to the meaning of 'matters in controversy' in S. 2 (2) Civil Procedure Code, it remains to be seen whether the other High Courts will nevertheless stick to them (see *Venkata Reddi* v. *Venkata Reddi* [5]. Cf. *Kamini Debi* v. *Promotho Nath Mukerji* [6].)

Dattajirao Ghorpade *v.* **Nilkantrao,** I.L.R. 39 B. 352.

The learned Judges base their ultimate conclusion on the circumstances of the particular case, and we have no quarrel with that; but we cannot help thinking that it will be highly detrimental to the best interests of judicial administration, to give an

1. (1913) I. L. R. 38 B. 381.
2. (1912) I. L. R. 36 B. 536.
3. (1914) 19 C. W. N. 755.
4. (1914) I. L. R. 38 B. 392.
5. (1915) 2 L. W. 519.
6. (1914) 19 C.W.N. 755.

undue extension to the doctrine laid down in the *Valloor case* [1], as to the authority of counsel or pleader to bind the client by his admissions and omissions. It is not uncommon to find a pleader in charge of a case easily fall in with the view of the presiding Judge on a point of law going to the root of the case, and if in that view he takes a particular course as regards the letting in of evidence, it will be seriously fettering the discretion of the appellate Court to say that as a matter of law, the client should be held bound by the course adopted by his pleader and be allowed no further remedy, however erroneous may be the view which led to the adoption of that course.

Javerbhai Jorabhai *v.* **Gordhan Narsi**, I. L. R. 39 B. 358.

We are not without doubts as to the correctness of the view that the compensation clause in the contract is enforceable though the mortgage itself be invalid in law. Our doubt rests not on any rule of law but on well established principles of construction. A person putting a mortgagee in possession, provided by one of the clauses in the deed that 'if the house should be taken out of your possession, we and our property, &c., shall be liable for any loss, &c., and for the money advanced.' As pointed out in the Tagore case, the terms of a document should be interpreted on the footing that the parties believed the transaction to be operative in law; and it seems clear from the context that the clause above set out referred only to such possession as the mortgagee may get on foot of the mortgage. If the mortgage turns out to be invalid, the mortgagee may have his own remedies under the law, but we do not feel convinced that the compensation clause in the contract can be applied as if it were an independent or collateral covenant. *Kerrison* v. *Cole* [2], and *Payne's case* [3], are not really analogous. The question is not as to the validity of the convenant but as to its scope and meaning. *Ut res magis valeat quam pereat* is no doubt an excellent rule, but not even that will justify a court in putting upon a contract a construction which the parties never contemplated. It is suggested that a mortgage right had been acquired by *prescription*; if so, relief might have been given on foot of the mortgage itself and not merely on the basis of the compensation clause alone.

1. (1902) L.R. 29 I.A. 76, s. c. I. L. R. 25 M. 367.
2. (1807) 8 East 231.
3. (1858) 3 H. and N. 572.

NOTES OF INDIAN CASES.

Kunwar Bahadur *v.* Bindraban: I. L. R. 37 A. 195.

In the light of the recent judgment of the Privy Council in *Venkatanarayana Pillai* v. *Subbammal* [1], the decisions of the Madras High Court in *Veeragya* v. *Ganamma* [2], *Kalavathal* v. *Thirupathi Pallavarayan* [3], *Ramanna* v. *Annamma* [4], and of the Allahabad High Court in *Bhagavanthc* v. *Lukhi* [5], holding that the cause of action of each reversioner is different would seem to require reconsideration. It seems to be their Lordship's opinion that all the reversioners have their cause of action at the same time, that is, at the date of the alienation when their common interests are jeopardised and though except in special circumstances the remoter reversioners may not sue alone, they may sue jointly with the presumptive reversioner and may continue the suit brought by the presumptive reversioner. Their Lordships look upon suits by reversioners as suits in a representative character, whether their object is to set aside alienations or to set aside adoption. The construction suggested by the Full Bench case of *Chinnavolu Ponnamma* v. *Annamma* [6], would seem to have the support of the Privy Council. The interpretation of art. 125, even as accepted by the later cases, does not prevent anomalies, for instance, a person who as a remote reversioner, might have yet time to sue find himself barred by art. 125 by the death of the nearer reversioner. The fact that some other was the presumptive reversioner at the date of the alienation and that the reversioner that sues was not even in existence at the time would apparently not be a bar to the application of the article. See *Bapanna Venkata Subbarayalu* v. *Bapanna Ratnamma* [7].

Indar Pal *v.* The Imperial Bank, I. L. R. 37 A. 214.

The holder of a pro-note from a Hindu father sued upon the note impleading the father as well as the sons but subsequently

1. (1915) I. L. R. 38 M. 406.
2. (1912) 23 M. L. J. 269.
3. (1905) 10 M. L. J. 229.
4. (1912) 24 M. L. J. 183.
5. (1899) I. L. R. 22 A. 33.
6. (1905) I. L. R. 29 M. 390.
7. (1910) 8 M. L. T. 121.

withdrew his suit against the latter. In these circumstances, could the decree got against the father be executed against the share of the son? That was the question in this case and their Lordships held that the withdrawal of the suit was not a bar to the execution. There was a partition subsequent to the decree which was also pleaded as a bar to the execution, but their Lordships having found, that the partition was a fraudulent and collusive one entered into with a view to defeat the creditor that difficulty was got over. If the right principle on which the Court executes the decree against the father against the son's share in the family property, and there is no doubt that that is the right principle—that the Court is only doing what the father himself could have done, or in the words of Sir Bhashyam Aiyangar—executing the power vested in the father, the creditor would be entitled to proceed against the son's share so long as there is no binding adjudication between himself and the son that the debt is not one which he is not liable in law to pay. Withdrawal of the suit might bar a fresh suit on the same cause of action but does not involve the adjudication of any such question as is referred to above. Similarly, the suit might be dismissed against the son on some technical ground *e. g.*, such as was apprehended in this case, that he was not a party to the note, or even for default. In such cases, there will have been no binding adjudication on the point that is essential for excluding the son's liability and the son's share might be proceeded against. The same cannot be said when a declaration of liability is sought against the son and it is not granted, or the son is made a party and such a relief could have been claimed against him and yet is not claimed. In both these cases, S 11 of the Civil Procedure Code, would seem to import an adjudication against such liability *Ramasami Nadar* v. *Ulaganatha Goundan* [1]. In this view, the correctness of *Yanamardra Papiah* v. *Lanka Subbasastrulu* [2], might be open to question.

We cannot share the doubts of Tudball, J., about the correctness of *Krishnasami Konan* v. *Ramasami Ayyar* [3], if the basis of the jurisdiction of the court to execute the decree against the son's

1. (1898) I. L. R. 22 M 2. (1914) 27 M. L. J. 276.
3. (1899) I. L. R. 22 M. 519.

share is the *power* of the father, that jurisdiction must cease when the power of the father ceases which would be the case when there is a partition. Even then the creditor will not be wholly without remedy. He can bring a suit on the footing of the *decree debt, Periasami Mudaliar* v. *Seetharama Chettiar* [1].

Chhabile Ram *v.* **Durg Prasad**, I. L. R. 37 A. 296 : S. 92 C. P. C. requires the consent of the Advocate-General to the institution but not to the continuance of a suit under that section. It is possible to hold that on the death of the party that obtained the sanction of the Advocate-General, the action must abate as is the case with class actions in England when the plaintiffs on record die. If the action can be continued we should think it can be (see *Sivagurnnatha* v. *Ramasami Aiyangar* [2], *Cf. Venkatanarayana Pillai* v. *Subbammal* [3], *Ramdas* v. *Hanumatha Row* [4], it is difficult to spell out of the section need for sanction for such continuance. On principle too, we do not see why the court cannot be trusted to take proper precautions as to the *personel* of the parties that are given leave to continue as much as the Collector or the Advocate-General. As for the existence of a *prima facie case*, that must have been found by the Advocate-General before giving leave to the institution of the suit.

Badan *v.* **Murari** : I. L. R. 37 A. 309.

See 65 cl. (*e*) of the Transfer of Property Act throws upon the mortgagor the duty of discharging prior mortgages on the land. It is inconceivable how it could be open to the mortgagor to set up a prior mortgage when he has acquired it, by inheritance or otherwise, as against the mortgagee. Though there was considerable difference of opinion in England as to the precise circumstances under which merger will take place, when the discharge or acquisition of the prior mortgage is by the owner of the

1. (1903) I. L. R. 27 M. 243
2. (1911) 25 M. L J 630.
3. (1915) I. L R. 38 M. 406.
4. (1911) 21 M. L. J. 952.

equity of redemption when he is not bound to pay it, there was never any doubt that he could not set up the mortgage as a shield when he himself was the person primarily liable to pay it. The intention of the party is material only when there is merely a payment and no transfer of the mortgage security. Whether a party acquiring the mortgage interest by transfer or inheritance can set up the mortgage does not depend upon his intention but is merely a question of law.

Kulada Prosad Deghoria *v.* **Kali Das Naik,** I. L. R. 42 C. 536.

We agree that the principle of construction laid down in this case, *viz.*, that where the language of ancient grants is ambiguous, evidence of usage thereunder is admissible as an aid to construction, is too well settled to be open to question, but we think it desirable to point out that in view of the very lax notions that appear to have obtained in this country till recently, as to the disabilities of persons in possession of endowed properties, it will be unsafe to attach much importance to their conduct in determining the true nature of the endowment.

NOTES OF INDIAN CASES.

Bombay Cotton Manufacturing Co. *v.* **Motilal Shivlal**, I. L. R. 39 B 386 (P. C).

It is scarcely possible to lay down any rigid rules as to the true function of a court of appeal in dealing with oral evidence. The Judicial Committee have from time to time pointed out that in such a matter, the Court of First Instance enjoys special facilities and that its conclusion should not therefore be lightly set aside. This is a wholesome rule no doubt, but it must be borne in mind only as a rule of caution and not magnified into a kind of legal presumption. In the case under notice their Lordships felt obliged to point out that 'cross-examination to credit is necessarily irrelevant to any issue in the action' but it is most relevant in a different sense. Any one acquainted with original trials in this country cannot help realising that in recording evidence, there is a curious combination of two conflicting tendencies—to let in a large mass of irrelevant evidence on the one hand and perhaps as a reaction against it, to shut out a certain amount of really relevant evidence. If two eminent Judges of the highest court in the country can err on a matter which their Lordships seem to treat almost as elementary, one need not wonder at the ways of courts in the mofussil.

Motabhoy Mulla Essabhoy *v.* **Mulji Haridas**, I. L. R. 39 B. 399 (P. C).

This case affords an interesting illustration of the wide scope for the misapplication of the principle of S. 92 of the Evidence Act. Parties pay more heed to the substance or result of the transaction they are entering into and are not careful enough to make it accord *in form* to the requirements of law; and the courts must be assiduous not to defeat their plain intent but to see if it cannot be given effect to consistently with law. On the merits of the case, their Lordships' judgment directs attention to a very familiar problem in Indian litigation. When different versions of a transaction are given by the parties, courts are naturally tempted to hold that if the version put forward by one of the parties is not true, that given by the other must be the truth. Their Lordships rightly disapprove of this process of reasoning. The failure of one side does not absolve the other

party from the duty of proving his case substantively, especially when the onus is on him. Attention may also be usefully drawn to their Lordships' protest against 'admissions' being 'dissected'. If a party seeks to rely on an admission by the other, he must take it as a whole and not merely so far as it is in his favour.

Mohini Mohan Misser v. Surendra Narayan Singh, I. L. R. 42 C. 550.

If the learned Judges had rested their decision on the question of fact, as to the want of probable cause, &c., we should have had nothing to say against it. Nor are we disposed to differ from them in the view that if the 'interlocutory' injunction in the former suit was the basis of the plaintiff's present suit for damages, the cause of action arose when the temporary injunction ceased with the termination of the suit, though by the decree in the suit a perpetual injunction was issued. But in so so far as the case goes further and lays down that a party can have no cause of action on the ground that a suit for a perpetual injunction was instituted against him maliciously and without reasonable and probable cause, and such injunction was obtained in one court, (though set aside on appeal), we venture to think that, in view of the state of authority on the point, the conclusion is too broadly and positively stated. It may be, as Fletcher, J., says, that 'there is no case in the books of a suit for damages against a defendant for maliciously and without reasonable or probable cause obtaining a perpetual injunction which was subsequently dissolved on appeal. But is this conclusive?

Take the case of a 'temporary' injunction first: Except *Nand Coomar Shaha's Case* [1], and *Wilson* v. *Kanhya* [2], we are not aware of any reported instance of a suit for damages in respect of an 'interlocutory' injunction. And in the course of his order in *Attorney General* v. *Albany Hotel Co.* [3], it was remarked by Justice North, with reference to the English practice of requiring an undertaking from the person applying for an interlocutory injunction, that 'it is difficult to see how in the absence of such an undertaking the defendant could recover from the plaintiff the damages which were really sustained

1. (1870) 13 W. R. 305. 2. (1869) 11 W. R. 143.
3. L. R. (1896) 2 Ch. at p. 699.

by him by reason of the improper order of the court.' Indeed, as early as *Novello* v. *James* [1] it appears to have been argued that but for the undertaking there would be no jurisdiction to award damages. But we are nevertheless inclined to believe that in accordance with well-established legal principles, a remedy by way of action does exist in cases in which an interlocutory injunction is obtained maliciously and without reasonable and probable cause. The Indian Procedure Code from 1859 downwards has *assumed* that such a suit will lie (by providing for the bar of such a suit by an award of compensation in the first suit itself) see S. 96 of Act VIII of 1859 and S. 497 of Act X of 1877; and we are unable to agree that this indication can be lightly ignored. We think that the reasonable interpretation of North, J.'s dictum above referred to, is to hold that the learned Judge was there speaking with reference to a claim for damages, *independent of any blame on the part of the plaintiff* who obtained the interlocutory injunction; for under the English practice, it is now settled that the undertaking entitles the other party to claim damages in all cases in which the plaintiff fails on the merits and not merely, as under the Indian Code (and as, it is submitted, will be the case under the general law) only in cases in which the plaintiff has acted improperly in obtaining the injunction or has instituted the suit without reasonable or probable cause (see *Griffith* v. *Blake* [2]. Seton on Judgments and Decrees, 7th Edition p. 510).

The question seems to be familiar in America, where the system of requiring an undertaking for damages rests not merely on practice but on express statutory provision. In a well-known American text-book, it is observed: "Some conflict of authority exists as to whether a defendant in an injunction suit may by an action on the case recover damages for having been enjoined without cause and the rule has been broadly stated that no such right of action exists and that his only remedy is by suit upon the injunction bond. The better doctrine however seems to be that the defendant's right of action at Common Law is not merged in the remedy upon the bond and that an action on the case will lie. But, to support such action, the plaintiff's pleading must clearly negative the existence of probable cause for the injunction." (High on Injunctions, S. 1648). Reference may also be usefully made in this connection to the

1. (1854) 5 De. G. M. and G. 876. 2. (1884) 27 Ch. D. 474.

analogous case of attachment or arrest before Judgment. Here, too, the English and American practice (in so far as such processes are allowed) seems to be to require an undertaking for damages, but it is nevertheless also recognised that an action will lie for wrongfully and vexatiously suing out an attachment auxiliary to the main suit (See Sedgwick on Damages, S. 467, see also *The Walter D. Walett* [1].) An instructive discussion on the point will be found in *Mangappa Setti v. Ganapati Gounden* [2].

Is there then any reason for making a distinction between a claim for damages caused by an interlocutory injunction and a like claim with reference to a perpetual injunction (dissolved on appeal)? Under the English and American practice no bond or undertaking is given in respect of a final injunction. But this circumstance throws no light on the question of the remedy under the Common law. Nor is there much force in the general argument (referred to by Richardson, J., in the case under notice) that the issue of the injunction being the act of the court, a party should not be held liable in damages for procuring an erroneous decision. The argument can as well be urged with reference to interlocutory injunctions. The theory is no doubt ordinarily correct; and the fact that a court made the order may be an important factor in the determination of the question of malice and want of reasonable cause. But if these facts are sufficiently established, the circumstance that the order was issued by the mistake of the court will be no answer (see for instance *Farley v. Danks* [3], and also the observations of Brett, M. R., in the *Quartz Hill Mining Co.'s Case*).

There is certainly more force—especially in view of the very wide provisions of S. 144 of the Code of 1908—in the suggestion that the party injured by the decree granting the injunction should, on its reversal, seek to compensate himself by way of 'restitution proceedings.' With reference to this, however, it must first be observed that the bar of a separate suit for the purpose has been enacted only in the new Code, and the argument would therefore have had no force before 1908 or on general principles. Again, though mesne profits and interest used to be allowed in restitution proceedings even under the old codes, a general provision for 'payment of damages' is

1. (1893) P. 202. 2. (1911) 21 M. L. J. 1052.
3. (1855) 4 E and B 493.

first enacted only in the Code of 1908. We are not aware of any case in which the loss sustained by reason of an injunction granted by a Court of first instance but dissolved on appeal has been claimed and allowed in restitution proceedings. In the absence of authority on the point, we are not without doubts as to whether a claim of that kind can be said to be 'consequential on the *reversal*' within the meaning of S. 144. Justice Richardson seems to think, not. It has also to be borne in mind that proceedings by way of restitution are founded on the mere fact of reversal and have no reference to any question of malice or want of reasonable and probable cause in respect of the institution or prosecution of the suit.

It remains to deal with the larger proposition, founded on the observations of Bowen, L.J., in the *Quartz Hill Mining Co.'s Case* [1], that at the present day 'the bringing of an ordinary action, however maliciously and however great the want of reasonable and probable cause, will not support a subsequent action for malicious prosecution.' English text-writers generally reproduce the rule thus stated by that learned Judge; and it must be admitted that (in the words of Bigelow) English policy is against giving redress, except in special cases, in respect of civil suits instituted of malice and without probable cause. For an interesting history of the course of English law on the point, reference may be made to the arguments of counsel in *Cotterell* v. *Jones* [2]. It is important however to note the reason of the rule and the exceptions thereto, as recognised by Lord Justice Bowen himself. The reason of the rule is that an unfounded civil action is not the cause of any damage of which the law can take notice and that the defendant who is unsuccessfully sued is sufficiently indemnified by a judgment in his favour which awards him his costs as well. This obviously cannot apply to cases in which the party sued sustains 'special damage' by reason of the suit—apart from the expenses and trouble incidental to the defence of the suit—and Bowen, L.J., recognises this. His view is not to be collected solely from the one sentence that is commonly found cited. He follows it up by saying "Whenever a man complains before a court of justice of the false and malicious legal proceedings of another, his complaint, in order to give a good and substantial cause of action, must show that the false and malicious legal

1. (1883) 11 Q. B. D. 674. 2 (1851) 11 C. B. 713.

proceedings have been accompanied by damage, express or implied"; and after referring to the 'three sorts of damage' specified by Holt, C. J., in *Savile* v. *Roberts* [1], *viz*, to a man's fame, to his person and to his property, he points out that an ordinary civil action (however malicious) does not necessarily and naturally damage a man's fame or person and as for damage to property, the award of costs must be held sufficient compensation for such damage as the law can recognise to be the 'natural or necessary consequence' of the action (Cf. also *Barnett* v. *Eccles Corporation* [2]). This explanation will not cover cases in which the defendant may, in consequence of an injunction, sustain special damage, for the order as to the costs of the action cannot reasonably be understood to cover such loss also. The maintainability of an action in such circumstances is clearly involved in the judgment of Brett, M. R., in the same case, with which Bowen, L. J., also expresses his general agreement (see also per Buckley, L. J., in *Wiffen* v. *Bailey &c., Union* [3]). The following statement in Addison on Torts (8th Edn., p. 29) seems to us accurately to represent the present position of the English law on the point. 'Such actions are rare owing to the absence of legal damage, but they are not unheard of; and if the process leads to legal damage, an action will lie'. Whether in any particular case the special damage alleged will be held to be the natural consequence of the suit or will be disallowed as only indirect or remote, is another matter. If the damage resulting from the deprivation of the use of one's property by *mesne* process can be held to be within the rule of 'natural and necessary consequence, (see *The Walter D. Wallett*), [4] it is difficult to see why similar damage consequential upon a 'final' process, like a perpetual injunction, should not be within the rule, too.

It may be noted in passing that the rule in most of the United States of America is not so limited as in England. The award of costs in a civil action is there not always regarded as a remedy by way of compensation for injury suffered in consequence of the proceedings and if the other elements, *viz.*, malice, &c., are shown, such injury will support a suit for malicious prosecution even in respect of an ordinary civil action (see American Cyclopaedia. Art 'malicious prosecution').

---

1. (1698) 1 Ld., Raym. 374 s.c. 91 Eng. Rep. 1147. 2. (1900) L R. 2 Q.B. 423.
3. (1915) L. R., 1 K. B. 600. 4. L. R., (1893) P. 202.

NOTES OF INDIAN CASES.

Gajanan Balakrishna *v.* **Kashinath Narayan,** I. L. R. 39 B. 410.

In view of the fact that there is no direct authority in support of the adoption of a step-brother, it would have been more satisfactory if the arguments for and against the validity of such an adoption had been fully examined. The decision under notice rests mainly on the ground that several other restrictions laid down by Nanda Pandita have been held to be merely recommendatory; and the learned Judges also hold that the question is practically concluded by the authority of more than one decision of their Court. With all respect, we are unable to agree that the earlier cases referred to by them have really dealt with the arguments advanced in the present case. Neither *Yamnava* v. *Laxman* [1] nor *Ramchandra* v. *Gopal* [2] has any true bearing. They deal with the scope of the exclusion by reference to 'sisters son' and hold that it is confined to the sister's son, the daughter's son and the mother's sister's son. This is supported by the very language of Nanda Pandita himself. In *Ramchandra* v. *Gopal* [2] it is also pointed out that the theory of prohibition with reference to eligibility for marriage—or the marriage theory as Mr. Sarkar conveniently terms it—is not warranted by anything in the Dattaka Mimamsa and is traceable to a mistranslation by Sutherland (See also Sirkar on Adoption Lecture VIII). But, as explained by Muthuswami Aiyar, J. in *Sriramulu* v. *Ramayya* [3] the prohibition of a step-brother's adoption must be traced to the rules relating to the practice of *Niyoga* and has nothing to do with the marriage theory. We are not aware of any case in which this explanation of Muthuswami Iyer, J. or the applicability of the Niyoga theory, as indicating the scope if not the basis of the rule prohibiting the adoption of certain persons, has been examined. We are unable to see any reference to it, much less any discussion of it, in *Ramakrishna* v. *Chimnaji* [4]. And we do not think that a judicial consideration of the bearing of the Niyoga theory on this point is precluded by the observations of the

1. (1912) I. L. R. 36 B. 533.
2. (1908) I. L. R. 32 B. 619.
3. (1881) I. L. R. 3 M. 15.
4. (1913) 15 Bom. L. R. 824.

Judicial Committee in *Sri Virada Pratapa* v. *Sri Brojo Krishore* [1] or by the approval by the same Board in *Puttu Lal* v. *Parbati Kunwar* [2] of the decision of the Allahabad High Court in *Jai Singh Pal Singh* v. *Bijai Singh* [3]. Among text-writers, earlier authors like Strange accept the marriage-theory stated by Mr. Sutherland and do not refer to the Niyoga theory or to the specific instance of a stepbrother's adoption. Dr. Jolly expresses disapproval of the marriage-theory but he also considers that the restrictions indicated by Nanda Pandita are not binding. Messrs. West and Buhler merely note the view indicated in *Sriramulu* v. *Ramayya* [3] Mr. Mayne does not clearly differentiate between the marriage-theory and the Niyoga theory but merely says that 'it is unlawful to adopt a brother or step-brother, etc.,' evidently on the authority of *Sriramulu* v. *Ramayya* [4]. Mr. Sarkar and Dr. Bhattachariya hold opposite views on the question. Mr. Mandlik is of course against Nanda Pandita altogether—and substantially Mr. Ghose too; but this extreme view is untenable in the face of the rehabiliation of Nanda Pandita by the Judicial Committee.

Dayabhai Raghunathdas *v.* Bai Parvati, I. L. R. 39 B. 438.

The learned Judges rightly hold that the provisions of the Guardians and Wards Act do not relate solely to guardians appointed or declared by the Court. While some of the sections are so restricted, there are others which apply to guardians in general, *i.e.*, whether natural, testamentary or appointed by the Court, and S. 25 is one of the latter cf. also Ss. 20, 21, 24, 27, 28. The result of a different view would be that a father would be driven to a suit, as the *sole* remedy, to recover custody of his minor child; for, in view of S. 19 of the Act, he could not get himself appointed or declared guardian of his child under the Act. Whether such a separate suit is permissible or not, it was certainly not the policy of the Act to compel a father to resort to a suit for the purpose.

---

1 (1876) I. L. R. 1 M. 69. 2. (1915) 29 M. L J. 63.
3. (1905) I. L. R. 27 A. 417. 4. (1881) I. L. R. 3 M. 15.

Ekradeshwar Singh *v.* **Janeshwari Bahuasin**, I. L. R. 42 C. 582, (P. C.)

The words 'putra poutradi' in grants have ordinarily been held to indicate an estate of *general* inheritance; but, as pointed out by their Lordships in the present case, they may in special cases, when construed with reference to the object of the grant or the custom under which the grant is made, denote a limited estate; and in such cases the validity of a grant in terms different from the ordinary law of inheritance must be justified on the ground of custom. With due respect to their Lordships, we cannot help feeling that their conclusion in the case as to the proof of the custom alleged is not easily reconcilable with the standard of proof in such matters, laid down in other decisions of authority. The plaintiff's claim was to apply the custom of exclusion of women to the succession of babuana property that had formed the subject of partition in the collateral branch. There were no prior instances of the particular kind, but their Lordships uphold the custom on the ground (i) that women do not succeed to the main estate, and (ii) that the babuana grants are made only to male members and revert to the main estate on the extinction of male members in the line to which the grant was made. We beg leave to doubt if this is not at best an extension of the custom by analogy. Even on that footing, it seems to us that the case of the main estate is not really analogous to that of a grant therefrom. And, as for the second ground, the revertibility of the grant, in certain contingencies, need not necessarily affect the incidents of the estate granted, so long as it enures. *Cf. Durgadut Singh* v. *Rameshwar Singh*[1].

Akhoy Kumar Banerjee *v.* **Corporation of Calcutta**, I. L. R. 42 C. 625.

The section of the Calcutta Municipal Act dealt with in this case (S. 228) corresponds substantially to S. 190 of the Madras City Municipal Act, 1904, and in the absence of any authority on the point in this Presidency, the decision in this case will be a useful

1. (1909) I. L. R. 36 C. 943 (P. C.)

precedent. The distinction between a charge and a mortgage, in their respective operation as against *bona fide* transferees for value is well-established, but it is not always easy to decide whether a particular liability imposed on land by the provisions of a statute amounts to the one or the other. The learned Judges affirm, on the authority of English cases, the principle laid down in *Himmat Lal* v. *Vasudev Ganesh* [1] and *Tiruvenkatachariar* v. *Venkatachariar* [2] that in connection with a plea of 'purchase without notice' the onus of proving absence of notice lies on the purchaser. But we fear that the rule as to 'enquiry' as laid down in the present case will make it well-nigh impossible for any transferee to discharge this onus. It seems to us putting the rule too high to say that a purchaser of a house, though he may have no reason to think that the taxes are in arrears, is under an obligation to make enquiries of the municipal authorities to ascertain if there are any arrears of taxes due on the house he intends to buy.

Khagaram Das v. Ramsankar Das Pramanik, I. L. R. 42 C. 652.

The question raised in this case is the same as that dealt with by a Full Bench of the Madras High Court in *Muthukrishna Iyer* v. *Sankaralingam Pillai* [3] and the same conclusion is arrived at. It is evident that the learned Judges hold that S. 74 of the Contract Act (as amended) covers the question and that it is not necessary to appeal to any general equitable jurisdiction of the court. After the exhaustive judgments delivered by the learned Judges who took part in the Madras Full Bench case there is little left to be said on the subject.

---

1. (1912) I. L. R. 36 B. 446.
2. (1913) 26 M. L. J. 218.
3. (1912) I. L. R. 36 M. 229.

NOTES OF INDIAN CASES.

Guda William *v.* **Guda Karunamma**, 29 M. L. J. 269.

The decision of the majority of the Full Bench in this case does not appear to us to be sound. The question is whether a decree for dissolution of marriage made by the District Judge can be confirmed by the High Court after merely giving notice to the parties and without requiring the petitioner to appear and move for confirmation. Wallis, C. J. and Ayling, J. answer that it can be done and that it is the practice of the Madras High Court to do so; Sadasiva Aiyar, J. following the view of the Allahabad High Court in *Culley* v. *Culley* [1] and *Forshaw* v. *Forshaw* [2], holds that it cannot be so done and that the petitioner must appear and move for confirmation. Under S. 16 of Act IV of 1869, it is clear that when a *decree nisi* is made by the High Court the petitioner must move to have such decree made absolute. The decree of the District Court is not even a *decree nisi*; indeed it cannot be regarded as operative at all till the hearing of the case by the High Court and its judgment. As the Privy Council pointed out in *Hay* v. *Gordon* [3], "it can scarcely be said that there are two separate judgments, inasmuch as the legislature has not thought it safe to entrust the court below with the power of pronouncing decisions which would be binding if not appealed against, but has made its decision operative only on confirmation by the High Court whose confirmatory judgment is practically the judgment in the suit. Sadasiva Aiyar, J. points out that there are no rules on the point made by the High Court under S. 62 of the Divorce Act. One may point out that the schedule of forms too is silent on the matter. But there can be no doubt that the petitioner who has obtained a *decree nisi* for dissolution has to appear and the case for confirmation has to be heard in every instance. The second paragraph of S. 17 requires it by express terms. Reading S. 17 and the other sections of the Act in the light of the observations of the Privy Council, there can be no doubt that the suit is first tried in the District Court and then is to be continued and heard in the High Court. We think, therefore, that the view of Mr. Justice Sadasiva Aiyar and the Allahabad High Court that the petitioner should appear and move the court to confirm the dissolution is the sounder view. There is neither reason nor any legal principle

1 (1888) I. L. R. 10 A. 559. 2. (1909) I. L. R. 31 A. 511.

3 (1872) L. R. Sup. Vol. I. A. 118.

to justify the view that the Court is bound or entitled to confirm the decree without knowing whether the petitioner desires to proceed with the petition further or not. The requirement in Section 16 that the petitioner should move to make a *decree nisi* absolute, the prohibition against the High Court confirming the decree of the District Court before six months, the terms of Section 17 requiring that there should be before the High Court a case for confirmation and that it should be heard and the principle that the court has no power or jurisdiction to dissolve a marriage if the parties do not desire it though it has the amplest power to refuse to decree dissolution in cases of collusion are, it is submitted, decisive against the correctness of the view taken by the majority of the Court. That there is no provision for giving notice in S. 17 and that the rule-making power under S. 62 is to be exercised consistently with the provisions of the Code of Civil Procedure only tend to establish the soundness of the view taken by Sadasiva Aiyar, J. and by the Allahabad High Court.

Lastly it is a question really not of practice but of the jurisdiction of the High Court. With reference to the remarks of the Chief Justice that the practice of the Madras High Court settles the matter, we would only refer to the observations of the Privy Council in *Palmer* v. *Hutchins* [1] that "no practice of the High Court can confer upon it any power or jurisdiction beyond that which is given to it by the Charter or law by which it is constituted." We do not know why the rule making power under Section 62 of the Divorce Act has not been (as it appears) exercised by the Madras High Court. The Indian Legislature often confers by various enactments rule making powers on the High Courts which unfortunately are seldom exercised and when exercised, the rules are not drafted with the requisite precision and legal imagination with due regard to the convenience of the litigant public and the necessities of litigious business.

Budhu Singh *v.* **Laltu Singh,** 29 M. L. J. 434 (P. C.)

The decision of the Privy Council in the above case is a very important one on a vexed question of inheritance and upsets what has been a settled rule of inheritance in the Madras

1. (1881) L. R. 6 A. C. 619.

Presidency for the last thirty years. We think the decision is if we may say so, sound and is more consistent with the spirit of the Mitakshara and its scheme of succession than the view which was taken by Turner, C. J. and Kindersley, J. in *Surayya Buktha* v. *Lakshminarayan* [1], with the approval of Mr. Justice Muthuswami Aiyar. The view of the Madras High Court was that the brothers' grandson does not take after the brother's son, but the inheritance at once ascends on failure of the brother's son to the paternal grandmother and that the words "brother's sons" "uncle's sons" did not include brothers' grandsons or uncles' grandsons. The contrary view has been maintained in Allahabad in *Kalian* v. *Ramchander* [2], and this has now been approved by the Privy Council as being the correct interpretation of the Mitakshara, thus settling the law for all the Mitakshara jurisdictions.

The question has no doubt been complicated by opposite views being taken by the Smriti Chandrika and the Subhodhini on the one hand and Apararka, Varadaraja and Nanda Pandita on the other. The principal and indeed the only difficulty has always been the reference by Vignaneswara to the compact series of heirs (in Mitakshara Ch. II. Sec. V pl. 2) coupled with the omission in the Mitakshara to refer to any competition between nephews and their sons in Ch. II Sec. IV pl. 7 & 8. The solution of the difficulty however turns more on what is the meaning of the word "*Putra* or "*Suta*" in the particular context. There can be no doubt that the words are capable of the extended signification which the Privy Council have given to them. The express mention of "sons and other descendants". in Ch. II Sec. 1 pl. 3, the technical and decisive significance of the word "*Aputra*" in Yajnavalkya's Smiriti and the wide meaning of the word '*Santhana*' in Ch. I Sec. V pl. 4 are sufficient indications of the view of the Mitakshara.

We welcome the judgment of Syed Ameer Ali as a learned, anxious and careful pronouncement on the important question and as an illustration of the recent tendency to get at the true meaning of Hindu Law texts unhampered by supposed considerations of *stare decisis* which on a close scrutiny will often be found to rest upon pure error whether of translation or of imagination. *Stare decisis* in matters of Hindu Law common to all

1. (1881) I. L. R. 5 M. 291. 2. (1902) I. L. R. 24 A. 128.

the provinces should be invoked more to produce uniformity and soundness than to perpetuate diversity and the dark age of the Hindu Law before it has received the illumination due to the revival of Sanskrit letters. A great deal no doubt can be said in favour of the opposite view which has been so forcibly and so well set forth by Benson and Abdur Rahim, JJ. in *Chinnasami Pillai* v. *Kunju Pillai* [1]. But the whole basis of that as well as of the earlier decision in *Surayya Buktha* v. *Lakshminarayana* [2] rests upon the Smriti Chandrika whose narrow views especially on the topic of Stridhanam have been already rejected by the Madras High Court. Though the question whether the whole line of each ancestor inclusive of his 6th descendant should be exhausted before the inheritance ascends to the line of a higher ancestor is left open by the Privy Council, there can be no doubt that Mr. Harrington's view is an extreme one and the line must be limited to three descendants of each ancestor. And the inclination of the Privy Council seems to favour this view. Nor do we think that the Privy Council have laid down any erroneous doctrine when they say that spiritual benefit cannot be altogether excluded from consideration as a test of propinquity, where other things are equal. The principle of an attenuated propinquity according to the Mitakshara has been erected into a fetish and has been pushed to such an extent as to make the Mitakshara school of inheritance more illiberal and artificial than the Dayabhaga school. After all, the value of any table of inheritance must depend on its close correspondence with ties of natural affection and blood as recognised by the community and we are glad the decision of the Privy Council in question has interpreted the Mitakshara aright and in conformity with progressive rather than reactionary tendencies.

---

1. (1910) I. L.R, 35 M. 152 : 21 M.L.J. 2. (1881) I. L. R. 5 M. 291.

NOTES OF INDIAN CASES.

Garden Reach Spinning & Co., v. Secretary of State for India. I. L. R. 42 C. 675.

In so far as the learned Judges, *in the exercise of their discretion*, refused to admit the additional evidence tendered in appeal, we have nothing to say; but with reference to their observations as to the jurisdiction and power of the Appellate Court to admit additional evidence, we beg leave to say that they place an unduly restricted construction upon the language of O. 41 R. 27 C.P.C. We would, to begin with, observe (in spite of *Krishnama* v. *Narasimha* [1]) that the language used in *Kessowji Issur* v. *G. I. P. Railway Co.*, [2], should not be pressed too far. The circumstances of the case were peculiar; the Appellate Court had, without assigning any reason, practically reversed the order of the Trial Judge refusing a review, to admit the additional evidence. And their Lordships rightly held that the main portion of S. 568 (b) of the Code of 1882 did not authorise that course. It was not necessary for them to deal with the scope of the provision about 'any other substantial cause' in that section, and the reference to S. 623 in the judgment does not, it is submitted necessarily imply that in the event of the discovery of new evidence after decree, the only course is to apply for a review and that no steps can be taken to get such new evidence admitted in appeal. It must be borne in mind that a Court of Appeal in India is not a mere Court of Error whose function is only to say whether or not, the first Court came to a right conclusion on the materials before it As pointed out by Sadasiva Aiyar, J. in *Audiappa Pillai* v. *Muthukumara Tevan* [3], it would be anomalous to hold that the Appellate Court can *after the disposal of the appeal* admit newly discovered evidence on review, but cannot admit such evidence in the appeal itself. See also *Venkatachala Pillai* v *Ranga Pillai* [4]. The suggestion of Abdur Rahim, J. in *Subba Naidu* v. *Ethirajammal* [5], that the 'substantial cause' referred to in the section should be 'ejusdem generis' with the two specified in the preceding portion of the section will practically nullify this comprehensive provision and the view has not generally met with approval in this Court.

1. (1908) I. L. R. 31 M. 114. 2. (1907) I. L. R. 31 B. 381 P. C.
3. (1912) I. L. R. 36 M. 477. 4. (1914) 28 M. L. J. 334.
5. (1911) 22 M. L. J. 14.

(See *Audiappa Pillai* v. *Muthukumara* [1] and *Kamesvarappa* v. *Chelapathi* [2].

Further, even if the judgment in Kessowji Issur's case is to be read as pointing to the remedy by way of review as the only course available in the circumstances then in question, it seems to us there is much force in the contention advanced in the case under notice that that principle cannot apply to a case where the new evidence *came into existence after the decree of the first Court. Cf. Kotagiri Venkatasubbamma Row* v. *Vellanki Venkatarama Row* [3]. The learned Judges leave that argument unanswered.

As to the *time* when additional evidence is to be tendered in appeal, the practice, at any rate in this Presidency, is to apply by petition beforehand, though the petition is generally dealt with by the Court when hearing the appeal. The Privy Council no doubt (in *Kessowji Issur's case*) comment on the fact that 'the additional evidence was ordered not after the appeal on the merits had been heard...............but on special and preliminary application' and they proceed to observe that the legitimate occasion for S. 568 is when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent. But this again, it is submitted, must be understood with reference to the fact that their Lordships were there dealing with the scope of Cl. (b) of S. 568 which speaks of the 'Court requiring'—not of the parties tendering—such evidence. It would, for instance, be unreasonable to apply that limitation to the first case provided for in the section, *viz.*, where the Lower Court 'has refused to admit evidence which ought to have been admitted'; and there is no more reason why the condition should necessarily apply to cases in which the Appellate Court allows additional evidence to be produced before it 'for other substantial cause.' It may be that applications for the admission of new evidence on appeal can be conveniently or preferably dealt with, when the Appellate Court is hearing the appeal; but it is a very different thing to say that the Court has *no power* to deal with such applications at any other time.

Kochu Rabia *v.* Abdur Rahman, I. L. R. 38 M. 589.

While we share the difficulty felt by the learned referring Judges in reconciling the decision of the Full Bench in *Randu-*

1. (1912) I. L. R. 36 M. 277. 2. (1914) M. W. N. 864.
3. (1900) I. L. R. 24 M. 1 (P. C.)

purayil Kunhisore v. *Noroth Kunhi Kannan* [1], with the decisions in *Sri Mana Vikraman* v. *Ananda Pathas* [2], and *Paru Amma* v. *Moothoradu* [3], we do not equally share their doubts as to the correctness of these decisions. There is an essential difference between contracts that limit the right of the tenant to make improvements and those that merely regulate the amount of compensation payable to him. As the question as to the amount of compensation would arise only at the date of eviction there is no question that *prima facie* the Act would be applicable to every case of contract before the act whether the parties acted on the faith of the existing law or they expressly fixed the amount of compensation. There is no reason why any distinction should be made between these two cases. In either case, the expectations of parties are equally disappointed. If justification is sought for in any rule of policy, that justification would equally avail in either case. These cases are analogous to cases where new statutes are passed enabling Courts to relieve against forfeiture or other oppressive terms. In *Kadir Moidin* v. *Nepean* [4], the Privy Council thought there was nothing wrong in applying the rules of the Transfer of Property Act as to accounting between mortgagor and mortgagee to a case to which the Act did not apply. It is quite otherwise in the case of the right to *make improvements*. In cases where the contract prohibits the making of improvements, to allow compensation is to annex a new incident to the contract. The Act nowhere confers a right to make improvements; it proceeds upon the assumption that there is such a right. But where the assumption is not justified the Legislature has come to the rescue by providing in S. 19 that the Act shall not apply to such a case.

Vasudeva Aiyar *v.* The Negapatam Devastanam Committee, I. L. R. 38 M. 594.

The distinction between a case where a power is vested in an officer as a Court and those where it is vested in him as a *persona designata* is somewhat fine and one is never quite certain that the distinction is correctly made in any particular case. In *Vijia Raghava Pillai* v. *Theagaraya Chetty* [5], a somewhat analagous case the Presidency Magistrate acting in matters of Municipal election was held not to be subject to the revisional jurisdiction of

1. (1908) I. L. R. 32 M. 1.
2. (1910) I. L. R. 34 M. 61.
3. (1912) 22 M. L. J. 221.
4. (1898) I. L. R. 26 C. 1. (P. C.)
5. (1914) 27 M. L. J. 227.

the High Court and curiously enough *Meenakshi* v. *Subrahmanya* [1], (a case of election of a committee member) was relied upon. Judging from the view their Lordships in that case took of the case in *Meenakshi* v. *Subrahmanya* [1], their Lordships seem to be opposed to the view taken in this case as to the powers of interference of the High Court. Analogies of non-judicial bodies entrusted with judicial functions can afford little help in the matter. To prevent a hasty leaning to one side or other, it may also be advisable to bear in mind the observations of the House of Lords in *Stephens* v. *Theatres* [2]. Where by a statute certain matters are referred to a court with nothing more, the necessary implication is that the court will determine the matter as a court; and if an appeal is open ordinarily from the decisions of that court, an appeal will lie in such cases also. This principle has been applied so as to give a right of appeal from the decrees of the District Court in appeals from Revenue Courts *Veeraraghavalu* v. *Venkatanarasimha* [3], *Venkataramier* v. *Vythilinga Thambiran* [4]. Though the *personnel* of the officer presiding may have been the motive for the power being entrusted to the Civil Court under S. 10. nevertheless the entrustment is to the Civil Court and not to the District Judge. But then revision may be excluded also on the ground that the function exercised by the court is a non-judicial one. Cf. *Ko Tha Hnyin* v. *Ma Hnin* [5], *Sivagami Achi* v. *Subramaniya Aiyar* [6]; where an appeal was held not to lie on the ground that the order though in execution and between parties was an administrative one. Though the observations of their Lordships in *Meenakshi* v. *Subrahmanya* [1], may not be authority for excluding revision on the ground that the tribunal is a non-judicial tribunal, they may be authority for doing so on the ground that the function is non-judicial or administrative one.

As regards the point decided in the case, it is certainly an anomaly that it should be in the power of the Committee by their default to deprive the public of their right of election but there is nothing to prevent the Judge from adopting in his discretion the same procedure as provided for in the case of elections by the Committee.

1. (1886) I. L. R. 11 M. 26.
2. (1913) A. C. 546.
3. (1914) I. L. R. 37 M. 443. (P. C.)
4. (1913) I. L. R. 38 M. 655.
5. (1913) I. L. R. [illegible] C. 717. (P. C.)
6. (1903) I. L. R. 27 M. 259.

NOTES OF INDIAN CASES.

Afzal Begam *v.* Akbari Khanum : I. L. R. 37 A. 326.

It is one thing to say that the court should not except on very special grounds permit the withdrawal of a suit pending an appeal so as to prevent the other party from having the fruits of his victory, but it is quite another thing to say that the Appellate Court has no power to permit the withdrawal of the suit. Yet that is what was decided in *Choragudi Chinna Kottayya* v. *Raja Varadaraja Appa Rao* [1]. The Allahabad High Court in the case under review declined to unsettle the course of practice in that Court settled by *Ganga Ram* v. *Data Ram* [2]. The practice in our Court also was similar and it is somewhat difficult to see what induced their Lordships to unsettle the practice here.

We must confess we are not convinced by the reasoning in *Choragudi Chinna Kottayya* v. *Raja Varadaraja Appa Rao* [1], which seems to us to be highly artificial. For one thing, S. 107 gives the Appellate Court all the powers that the first Court has. A party may or may not have the power in appeal, which he has during the pendency of the suit but that cannot cut down the powers of the Court. In *Gregory* v. *Dooley Chand* [3] Sir Barnes Peacock felt no difficulty in holding that the Appellate Court had that power. It has for instance been held that the rules as to compromise (O. 23 R. 3) and as to addition of parties (O. 1 R. 10) apply to appeals though the reasoning adopted in this case may in part apply to those cases as well. Under the English Practice an action may be discontinued even after judgment though only with leave of the Court. See *In re Alpha Company, Ltd.* [4].

Abdul Majeed *v.* Khirode Chandra Pal, I. L. R. 42 C. 690.

While we fully appreciate the view that 'the exploitation of the necessitous, of the careless and inexperienced is a trade to be extirpated' and that 'it is the duty of the Courts to enforce the letter of the law against obviously harsh and unconscionable bargains,' we must also emphasise the well-known maxim that

1. (1914) 27 M. L. J. 44.
2. (1886) I. L. R. 8 A. 82.
3. (1868) 14 W. R. 17 (O. J.)
4. (1903) 1 Ch. 203.

Courts should not be tempted, even by hard cases, into laying down bad law. The power of the Court under S. 74 of the Contract Act is one thing; the question of 'undue influence' within the meaning of S. 16 of the Act is a different thing; and mistakes are inevitable, if Courts should wrest out of their context observations found in cases dealing with the former question and apply them to cases raising the latter. We must also point out that the scope of S. 16 of the Contract Act is not co-extensive with that of the English Money Lender's Act. With all respect to the learned Judges, we feel grave doubts as to whether the circumstances of the case under notice justified them in interfering in second appeal and finding 'undue influence' as a matter of fact. In view of authorities like *Dhanipal Das* v. *Raja Maneshar Bhasksh Singh* [1], and *Sundar Koer* v. *Rai Sham Krishnan* [2], the principal question in connection with the application of S. 16 of the Contract Act, would seem to be, 'Is there anything in the position of the parties to show that one of them was in a position to dominate the will of the other'. Urgent need of money on the part of the debtor is not sufficient of itself to bring a case within the section; and as for the transaction being hard and unconscionable, cl. (3) of the section takes note of it only if, *in addition thereto* one party is in a position to dominate the will of the other. An excessive rate of interest, if unexplained, may of itself be evidence that the transaction is an unconscionable one *Samuel*, v. *Newbould*[3], and it would also be an important fact in leading to an inference on the question of the position to dominate: but it is too much to say that it raises a 'presumption' of undue influence which requires to be rebutted. *Muthukrishna Iyer* v. *Sankaralingam Pillai* [4], deals only with S. 74 of the Contract Act and has nothing to say about the doctrine of 'undue influence'. As regards *Kesavulu Naidu* v. *Arithulai Ammal* [5] we are unable to agree with the interpretation sought to be placed on it by the learned Judges of the Calcutta High Court. As we read the judgment, Sir Arnold White, C. J. held that there was no evidence to show that the will of the executant was dominated by anybody and not that the presumption of undue influence was rebutted. Sankaran Nair, J. no doubt puts the case more strongly in favour

1. (1906) I. L. R. 28 A. 570.
2. (1906) I. L. R. 34 C. 150.
3. (1912) I. L. R. 36 M. 229.
4. (1906) L. R. A. C. 461.
5. (1912) I. L. R. 36 M. 533.

of 'undue influence', but it is clear that he felt pressed by the fact that "the debtors were women who were not able to enter into the transaction themselves", and he too lays stress on the necessity of the Court coming to a conclusion as to the 'position of the parties', apart merely from any inference that may arise from the excessive rate of interest. We do not think that either of the learned Judges can be said to have laid down that a 'presumption of undue influence' arises from the unconscionable nature of a bargain.

Secretary of State for India v. Kirtbas Bhupati Harichandan Mahapatra. I. L. R. 42 C. 710 (P. C).

Their Lordships here re-affirm the view indicated in some of their early decisions that in the case of permanently settled estates, the Zemindar has the *prima facie* title to the full enjoyment of every parcel of land within the ambit of the Zemindari and that if in respect of any such land Government should claim a right of resumption, the onus lies upon Government to show that the settlement was made subject to reservations in respect of the land sought to be resumed. We cannot help remarking that many an act of the Government both, executive and legislative, in recent times cannot easily be reconciled with this view as to the scope and effect of the settlement.

Re. Nagappa Thevan I. L. R. 38 M. 602.

"Delegatus non potest delegare" is a trite but useful maxim. It seems to have been lost sight of by the Local Government and the Collector in this case. It is a bit surprising that the mistake should have occured the delegation being of a discretion which involved serious responsibility.

Suryanarayana *v.* **Patanna**, I. L. R. 38 M. 608.

With all deference, on the question of onus of proof, we should prefer the view taken in *Indety Chinna Nagadu* v. *Potukanchi Venkatasubbayya* [1], *Veerabhadrayya* v. *Sonti Venkanna* [2], and *Jagannathacharyulu* v. *Kutumbarayudu* [3], As pointed out in those cases there may be a presumption that an inam ordinarily is only a grant of the Melwaram but there is no justification for the presumption that the grant was made to a person who was not the owner of the kudivaram. There is a well marked distinction in this matter between Zamindaries and Inams. In the case of Zamindaries except with regard to waste lands and private lands, there could be no pretence that the Zamindar was the owner of anything but the melwaram. While the history and the peculiar conditions of Zamindaries justify the presumption that they are nothing more than the sovereign's representatives, owing to the continuation generally of the title in the same family and the comparative opulence of the class the grant of kudivaram rights to the occupant even where yearly leases had taken the place of permanent rights worked no great hardship. In *Chekatti Zamindar* v. *Ramasooru Dhora* [4], the general practice in Zamindaries was considered to justify not only the presumption of occupancy rights in immemorial tenants but also a presumption that even newly admitted occupants had similar rights. The conditions of Inams are entirely different and there was also no parallel course of decisions in respect of them. In *Venkatacharlu* v. *Kandappa* [5], what was decided was that the Inamdar if he wanted to eject a tenant, should strictly prove his right to eject; in other words the Court refused to draw presumption in favour of yearly tenancy. If for any reason, the tenant had to prove that he had occupancy right, the Court would in the absence of evidence, have similarly rejected his claim. In *Natesa Gramani* v. *Venkatarama Reddi* [6], their Lordships refuse to apply the rule laid down in *Cheekatti Zamindar* v. *Ramasooru Dhora* [7], with regards to newly admitted tenants to Inams. Introduction of a tenant has been in some

1. (1910) M. W. N. 689.
2. (1913) 24 M.L.J. 659.
3. (1914) 27 M. L. J. 233.
4. (1899) I.L.R. 23 M. 318.
5. (1891) I. L. R. 15 M. 95.
6. (1907) I.L.R. 30 M. 502.
7. (1899) I. L. R. 23 M. 318.

cases, held to be sufficient proof of Kud-varam right in the Inamdar. It is doubtful whether even in the case of post settlement Inams, the invariable presumption of grant of occupancy rights would have been justified. Minor Inams have never been held to come within the rule and have been wholly excluded by the Act. Having regard to the language of Sec. 3-2 (d) and the general rule as to burden of proof as to jurisdiction and more especially to the considerations above referred to, the preferable view seems to be that taken in these decisions. The practice of the Brahmin communities in no part of the Presidency justifies the inference that they could not be the cultivators of the soil. On the other question in this case, namely whether surrender or abandonment amounts to acquisition we should think the argument of Sadasiva Aiyar J. based on S. 6 is sound and the two must be mutually exclusive. The terms "surrender" and "abandonment" are not defined anywhere in the Act though the term "surrender" is used in S. 187 cl. (b) as an equivalent of relinquishment under S. 149 thereby clearly indicating that it is not used in the sense in which that term is used in S. 111 of the Transfer of Property Act. In other words it is not used in the sense of a bilateral act but only in the sense of a unilateral act. The term "abandonment" occurs nowhere else in the Act. It is used in the Bengal Tenancy Act to indicate relinquishment by the tenant inferred from his quitting or alienating the holding. Having regard to the connotations of these terms it is possible as pointed out by Sheshagiri Aiyar J., in *Venkata Sastrulu* v. *Sitaramudu* [1] that surrender where it is a bilateral act may amount to an acquisition, notwithstanding the use of the term in S. 6. Surrender and abandonment in so far as they are not bilateral acts can hardly be styled modes of acquisition; they are rather modes in which the tenant's interest may be extinguished.

---

1. (1915) 26 M. L. J. 585.

Muthu Sastrigal *v.* **Viswanatha Pandara Sannidhi, I. L. R.** 38 M. 660.

"Of things that do not appear and things that do not exist the reckoning in a court of law is the same" *Seaton* v. *Burnand* [1]. If so, an unstamped pronote does not exist and why should the court not ignore the making of it and give a decree on the liability that arises by reason of the receipt of the money? It is certainly inconsistent to rely on the note for the purpose of repelling the claim based on the receipt of money while ignoring it when the claim is based on a pre-existing cause of action and seems to be opposed to the plain words of S. 35 of the Stamp Act which prohibits its being *acted* on for any purpose. If the section had simply said that unstamped documents shall not be admitted in evidence, there might have been some scope for argument based on the language of S. 91 of the Evidence Act which speaks only of the *terms* of contracts and not of their existence, though the correctness of the argument is open to considerable doubt. But as the section stands, it is certainly not permissible to the court to base its judgment on the existence of the note.

---

1. (1900) A. C. 135.

NOTES OF INDIAN CASES.

Bal Gangadhar Tilak *v.* **Shrinivas Pandit,** I. L. R. 39 B. 441 (P. C.)

It is alike refreshing and encouraging to come across instances, now and then, of justice ultimately obtained at what, according to ancient theory, is held to be the 'fountain of justice'; and by general consensus of opinion in this country, the present seems to be an instance of the kind. Judicial authorities in India, both high and low, will it is to be hoped sufficiently realise the need, so forcibly pointed out in the judgment under notice, for a due observance of established rules of procedure. On the point arising under the Hindu law of adoption their Lordships' decision in this case finally establishes that even among Brahmins, *Dattahomam* is not essential for the validity of an adoption within the same *gotra*.

Timangowda *v.* **Benepgowda,** I. L. R. 39 B. 472.

Whatever equities may arise in cases in which a person entitled to a sale of property has paid the consideration therefor but has not obtained a registered sale deed as required by law, there need be little hesitation in agreeing with the conclusion in the present case that a person who has a mere contract in his favour and done nothing in pursuance thereof cannot resist the legal owner's claim to possession. The observation of the Judicial Committee on this point, in *Immudipattam Tirugnana* v. *Periya Doraisami* [1], is certainly not easy to get over, but a long line of decisions of that Board, of which one of the most recent is that in *Mulraj Khatau* v. *Viswanath Prabhuram Vaidya* [2], referred to in the Judgment under notice clearly recognise that the English rules of equity cannot prevail in the face of express provisions of the Indian Statute Law. The extent to which their Lordships are prepared to go in the strict enforcement of statutory provisions is shown by their recent decisions under the Registration law holding that even as between the parties themselves and in spite of the acquiescence of the executant a completed transaction is unenforceable because of what one might otherwise be disposed to consider to be mere 'irregularities' in registration, such as presentation by a person with defective authority or registration

1. (1900) I. L. R. 24 M. 37. 2. (1912) I. L. R. 37 B. 198.

in a wrong office. This attitude is in marked contrast to that of the English Courts in the early days in working the Statute of Frauds and is sufficient to make one pause before importing equitable considerations into the operation of Indian statutes.

Vasudeo Raghunath *v.* **Janardhan Sadashiv**, I. L. R. 39 B. 507.

On the finding of the Courts below, the question before the High Court was whether a transfer in fraud of creditors could be avoided by the auction-purchaser in an execution-sale held at the instance of a creditor, when the creditor himself had not taken steps to get the sale avoided under S. 53 of the Transfer of Property Act. The learned Judges have easily come to the conclusion that the auction-purchaser not being a 'creditor' himself nor a 'subsequent transferee' in the sense contemplated in S. 53, cannot have the fraudulent sale set aside. We cannot help feeling that the point has not been sufficiently discussed.

It seems to us necessary for the present purpose to draw a distinction between the two classes of alienations dealt with in S. 53 *viz.*, those in fraud of creditors and those in fraud of purchasers. As is well known these are separately provided for in England by the 13 Elizab. C. 5 and the 27 Elizab. C. 4 respectively. With reference to alienations of the *latter* kind, the question now under consideration is covered by the decision of the Judicial Committee in *Godfrey* v. *Poole* [1]. Adopting the explanation given in *Doe D. Newman* v. *Rusham* [2], as to the principle underlying 27 Elizab. C. 4, Sir Barnes Peacock there points out that the invalidation of the voluntary conveyance will result only from a *subsequent sale by the same person* and cannot follow on a sheriff's sale. Taking another line of argument from *Dolphin* v. *Aylward* [3], he also observes that the judgment-creditor can only seize or sell in execution the 'interest' of his debtor and that after the voluntary conveyance in question the debtor himself had no interest in the property though he could defeat the conveyance by a proper sale to another person.

1. (1888) L. R. 13 A. C. 497. 2. (1852) 17 Q. B. 724; s.c. 21 L.J. (Q.B.) 139
3. (1870) L. R. 4 H. L. 500.

But an alienation *in fraud of creditors* does not stand on the same footing. No doubt in this case also the transferor ceases to have any interest in the property after the alienation, but the property is nevertheless available for his creditors; and if the creditors could proceed against it, that means that the purchaser at the sheriff's sale can acquire a good title to it as against the original transferee from the debtor. The general statement that the execution-purchaser acquires only the 'right, title and interest of the judgment-debtor' should not be interpreted to mean that the purchaser stands for *all* purposes in the shoes of the judgment-debtor, as one claiming *under* him. The sale is a sale by the law and not by the owner (Cf. *Dinendro Nath* v. *Ramkumar* [1], *Wickham* v. *The New Brunswick and Canada Ry. Co.* [2],) and the purchaser will get whatever interest the decree-holder is entitled to bring to sale. Thus in *Saratchandar Dey* v. *Gopal Chandar Laha* [3], the Judicial Committee in upholding the title of the auction-purchaser as against the real owner observed that as the mortgagee had a title by estoppel (as against the real owner), 'he could give a good title to a purchaser under a mortgage sale whatever may be the state of knowledge of the person purchasing.' The real question therefore is, can the decree-holder proceed against the property without first getting the debtor's alienation of the same declared void as against himself or as against creditors generally: or, in another form, what is the stage and what the form of proceeding, in which the question of fraud of creditors can be raised.

It is no doubt often stated that the question under S. 53 can only be tried in a suit properly constituted, that a suit for the purpose must be brought on behalf of the whole body of creditors and so on. Such observations would properly seem to relate to the right of a creditor *as such* (whether he has obtained a judgment or not) to raise the question and not to his right *as decree-holder, i. e.*, after obtaining a decree, to proceed in execution against the property forming the subject of the fraudulent alienation. (See May on Fraudulent Alienations 3rd Edition p. 311). Under the English Practice it would appear that 'a sheriff, bailiff or other officer executing a process against a debtor in right of a creditor may treat a fraudulent deed as void and seize notwith-

1. (1881) I. L. R. 7 C. 107. (P. C.) 2. (1865) L. R. 1 P. C. 64.
3. (1892) I. L. R. 20 C. 296.

standing' (May, p. 109). Mr. Bigelow also explicitly states that it is not necessary for the creditor to go into equity, unless other facts require, to set aside the conveyance; against the creditor, the conveyance is inoperative to the extent of his claim; he may levy directly (Bigelow on Fraud Vol. 2 ch. 16 S. 4, 1890 Edition, p. 415). In India, the question of fraud of creditors has often been allowed to be raised *as a defence* in suits (under S. 283 Civil Procedure Code) arising after claim proceedings (see *Ishan Chandar* v. *Bishu Sirdar* [1], and *Rajani Kumar* v. *Gaur Kishore* [2]), and the point will be found discussed at some length in *Abdul Kadir* v. *Ali Mia* [3]. We may also add that in *Doe D Grimsby* v. *Ball* [4], the question under 13 Elizab. C. 5 was allowed to be raised in defence to an action of ejectment. It was contended for the plaintiff that if the alienation was alleged to be within the statute, resort must be had to a Court of equity to set it aside and that the plea of fraud could not be urged in a Court of law; but the argument did not prevail.

S. 53 of the Transfer of Property Act only provides that the transfer is voidable at the option of the person defrauded; it does not require that the option should be exercised by him only by suing as a plaintiff. He may show his election by proceeding against the property in execution, thereby inviting a claim by the alienee, so that the question may be decided finally in the suit under O. 21. R. 63. (S. 283 of the old code). The theory of the necessity for a 'judicial avoidance' referred to in *Rajah of Ramnad* v. *Arunachalam Chetty* [5] has no application here, the creditor being a stranger to the transaction. Whether the attachment and proceedings based thereon shall have any effect at all will of course depend upon the ultimate decision of the question of fraud; but there is nothing in the language of S. 53 to lead to the inference that a creditor can proceed to attach the property comprised in the alienation *only after obtaining an adjudication* that the alienation was in fraud of creditors.

A further difficulty however still remains: suppose the alienee does not choose to put in a claim petition—and he is not *bound* to put in one; is the decree holder to be thereby foiled or can he

---

1. (1897) I. L. R. 24 C. 825.
2. (1908) I. L. R. 35 C. 1051.
3. (1912) 15 C. L. J. 649.
4. (1843) 11 M. & W. 581.
5. (1913) 24 M. L. J. 592.

proceed to sale, leaving the question to be afterwards agitated between the alienee and the auction-purchaser? It is stated in May's book (p. 117) that 'a purchaser from the sheriff, selling under a writ of execution, does not represent the execution creditor, so as to entitle him to impeach under 13 Elizab. C. 5. a conveyance previously made by the debtor.' The proposition seems to us open to question. Such a view will practically nullify the rule recognised almost from the day that the statute was passed (see Dyer. 294 (b) and 295 (a)), that the judgment-creditor or sheriff can proceed to levy execution direct; for what is the use of that right if the purchaser at the sheriff's sale will get nothing by his purchase? The author himself observes that 'the opposite appears to be the rule in U.S. America' (as to which see 20 Am. Cycl. 433). The only English authority that he refers to, *Godfrey* v. *Poole* [1], far from lending support to his proposition, seems, if anything, to suggest the contrary. The question there arose between the execution purchaser and the persons claiming under the prior transfer by the debtor. If it were the rule that the court-sale purchaser could not raise the question under 13 Elizab. c. 5, as was held in that very case to be the rule with reference to the plea under 27 Elizab. c. 4, the Judicial Committee need not have discussed the merits of the charge under 13 Elizab. c. 5. It is significant that with reference to the plea under 27 Elizab. c. 4, their Lordships *assume* the invalidity of the prior transfer and yet rule out the court purchaser as not entitled to the benefit of such invalidity, whereas, in respect of the charge under 13 Elizab. c. 5, they have thought fit to examine and uphold the transfer on the merits. The passage above cited from May's book, does not, it is submitted, touch the question from the right standpoint. It is immaterial whether or not the purchaser can be held to 'represent' the execution creditor, for he is not seeking to raise the question of fraud of creditors on *his own initiative*. By bringing the property to sale, in spite of the prior alienation, the *creditor* has *himself* exercised the option, given to him by the law, to impeach the transfer. The auction-purchaser has only to establish that the circumstances of the alienation were such as to justify the *creditor's election*. The further reason assigned in May is clearly untenable. He says "The purchaser acquires only the debtor's interest in the property; and assuming that the

1. (1888) L. R. 13 A. C. 497.

NOTES OF INDIAN CASES.

Parthasarathi Appa Rao v. Secretary of State, I.L.R. 38 M. 620.

The question for decision in this case was whether the reversionary right in Inams granted prior to the permanent settlement for services to be rendered by the inamdars to the Zemindar in addition to the payment of quit rent is vested in the Government or the Zemindar. As their Lordships of the Privy Council say in the recent case of *Secretary of State* v. *Kritibas* [1] the Zemindar is *prima facie* entitled to every parcel of land within the zemindari and it is for the Government to show that they are entitled to resume any portion of it by reason of some reservation at the time of the permanent settlement. Under S. 4 of the Regulation XXV of 1802, they reserve the right of resuming Lakhiraj lands and lands paying only favourable rents. Lakhiraj is a well-known term applied to lands which by reason of a special exemption in a royal grant or by having been legally devoted to religious uses or by other means, had become free from khiraj or assessment to the Government. *Raja Leelanund* v. *Government of Bengal* [2]. Lands held by private persons in lieu of wages though paying no assessment were not Lakhiraj lands for the obvious reason that the state was not interested in paying them and the Zemindar himself had no authority to exempt any land from assessment for such services.

Lands subject to personal service to Zemindar cannot therefore be Lakhiraj to any extent nor can they be called lands paying favourable rents, the latter for two reasons ; in the first place, because if they do not pay full money rent, they pay their equivalent in service ; in the second place because having regard to their obvious origin from the zemindars they cannot be regarded as lands paying favourable rent, in other words partially exempt from revenue. Even reading the section strictly, as Sir Sankaran Nair says, lands subject to service are not lands paying only favorable rents.

Krishnammal v. Sundararaja Aiyar, I. L. R. 38 M. 698.

In this case, their Lordships hold, we think rightly, dissenting from *Narayana* v. *Kandasami* [3], that omission to combine the claim for possession when suing for specific performance of a contract of sale does not bar the subsequent suit for possession based on title. The ground on which the conclusion ought to be based is to be found, we think in *Nathu* v. *Budhu* [4] *Zemindar of Vizia-*

1. (1914) I. L. R. 42 C. 710.
2. (1855) 6 M.I.A. 101 at 109 & 112.
3. (1898) I. L. R. 22 M. 24.
4. (1898) I. L. R. 18 B. 53.

nagaram v. *Behara Suryanarayana*[1] and *Ramasami* v. *Vaidhyanatha*[2]. In fact, there are two causes of action, one based on the covenant to deliver possession implied in the sale and the other based on title. The distinction is brought into relief when the period for which damages can be recovered for the withholding of possession is considered; in the one case damages can be recovered for 6 years, at all events, when the sale deed is registered, in the other mesne profits for only three years can be recovered. Again, as Sir Sankaran Nair, J., points out there is a difference in respect of persons to be made parties according as the action is on the contract, or on title. Where the action is based on contract it is difficult to see why the fact that the right to possession arises in point of time after the execution of the conveyance should make the two claims, different causes of action. Nor can the analogy of instalment bonds and rent suits be appealed to as justifying successive suits on the two claims though arising out of the same cause of action because in those cases it is not permissible to combine claims to arise in future; whereas it is always permissible to combine the claim for possession with a claim for specific performance (See Form 47 appendix A, C.P.C.). If the two claims were claims based on distinct causes of action, they could not be combined without leave of the Court. But the claims based on contract and on title are distinguishable in the same way as the claim for divorce on the ground of misconduct on the part of the wife was distinguished by the Privy Council from the claim for partition on the ground of such divorce. "The partition may no doubt", say their Lordships, "be treated as relief consequential upon the divorce and therefore dealt with in the same suit, but the evidence is different and the ground of divorce must be first and separately proved as a distinct cause of action before any question of partition can properly arise. If the Court should be of opinion that a petitioner has unnecessarily severed his claim for a partition from his claim for a divorce, it may, of course, punish the plaintiff by the exercise of its discretion as to costs, but their Lordships are of opinion that such a severance does not come within the mischief aimed at by Ss. 42 and 43 of the Civil Procedure Code so as to bar the claim to a partition which may be founded on the decree for divorce itself." *Maung Pe* v. *Ma Lon Magale*[3].

1. (1901) I. L. R. 25 M. 587.
2. (1903) I. L. R. 23 M. 760 at 775; s.c. 13 M. L. J. 448.
3. (1911) I. L. R. 38 C. 629 P. C.

NOTES OF INDIAN CASES.

Angammal v. Aslami Sahib, I. L. R. 38 M. 710.

On the question as to the tenant's right to remove the materials of the buildings constructed by him even after the expiry of the lease, we think the view of the majority that it is unaffected by the Transfer of Property Act is right either on the ground of *local usage* as suggested by Sir V. Bhashyam Aiyangar in *Ismaikani Rowthan* v. *Nazar-ali Sahib* [1] and by Fletcher and Chatterjea, JJ., in *Kani Lal Jalan* v. *Rasik Lal Sadhr Khan* [2] or on the ground that it is an incident of the contract of tenancy which is not inconsistent with any of the provisions of the Transfer of Property Act and as such preserved by S. 2 Cl. (*b*) of that Act. The argument based on hardship suggested by Garth, C.J., in 8 C. 582 has really no substance; for, the fact that the tenant is entitled to remove the materials within a reasonable time after the expiry of the lease, does not take away his duty to restore vacant possession immediately on the expiry of the lease with the premises in as good a condition as they were in at the date of the demise and if his buildings interfere with such delivery he is bound to make compensation for such interference. The question may be looked at also from another point of view. The tenant's duty is limited to restoring it in the condition in which it was delivered to him and the right of the landlord to claim the materials is really based on the general law involved in the maxim *quicquid plantatur*, etc., The absence of such a rule in India may well entitle the court administering rules of equity and good conscience to give the defendant time to remove his materials. It would seem to be but a rule of *common justice* such as is referred to by Lord Macnaughten in *Henderson* v. *Attwood* [3] Cf. *Ganga Din sonar* v. *Jagat Tewari* [4]. But the tenant having been evicted, whether he should have a similar indulgence is another matter. On the whole the *Via Media* suggested by Mr. Justice Miller, supported as it is by the analogies of English law as to trade fixtures, seems to best accord with equity. The reasoning of Mr. Justice Sankaran Nair based on the absence of the rule *quicquid plantatur* in India ignores the fact that the absence of that rule

1. (1908) I. L. R. 27 M. 211.
2. (1914) 19 C. W N. 361.
3. (1894) A.C. 150, 168.
4. (1914) 12 A. L. J. 1026.

does not warrant the affirmation of an absolute right in them to the tenant and also assumes that the owner of a land is bound to give way leave to a person whose goods might be on his land at any time he chooses. Nor is there any warrant for casting a duty on the landlord to pull down the buildings and hand over the materials to the tenant. Even assuming the tenant remains the owner of the materials of the building, the tenant can have no cause of action against the landlord for enjoying the benefit of the materials so long as no actual *conversion* takes place so as to entitle him to sue for the value of the materials. Where the building has been raised with the consent of the landlord, S. 63 of the Easements Act might apply but even that section gives only a reasonable time for the removal of the goods placed on the land.

On the other question as to the tenant's right to compensation there is we think much to be said in favour of the view of Sankaran Nair, J. that in the case of tenancies of uncertain duration when the landlord gives consent to the construction of permanent structures, he is bound to pay compensation for them when he puts an end to the tenancy. On the faith of the license given by the landlord, the tenant having executed a work of a permanent character and incurred expense in the execution (see S. 60 Easements Act), the landlord is not entitled to revoke the license without making compensation for the expense incurred.

Re Lewis: I. L. R. 38 M. 7[illegible]3.

Unless we are grossly mistaken, there seems to be a slip in this case. In S. 40, the word offence is stated to be used in the extended sense of "things made punishable by special or local law" in certain of the sections of the Penal Code and among those, Chapter IV which includes S. 79 is specially mentioned. S. 79 and not merely the principle of S. 79 therefore would apply to forest offences...

Lakshmammal *v.* Narasimharaghava Aiyangar, I. L. R. 38 M. 747.

Although it is questionable if the plaintiff's view as to what is material, can make a really immaterial alteration a material one, in this case the effect of the alteration being to convert a negotiable into a non-negotiable instrument, the alteration must be considered to be material and in that view the judgment is obviously right.

NOTES OF INDIAN CASES.

Rani Rajat Dat *v.* **Sheo Dayal:** I. L. R. 37 All. 439.

Mr. Justice Pigott in this case, lays down the correct rule we think when he says that in sanction cases, the Appellate Court is expected to exercise an independent judgment whether on the facts sanction should or should not be granted. It is difficult to see what power the Court has, to cut down the right of the party to an appeal on the facts when the legislature has not chosen so to limit it. No doubt there may be some cases in which an element of discretion enters for instance those cases in which though there is a *prima facie* case, the Court may not consider it in the interests of justice that prosecution should take place. In such cases, according to well-known principles, the Appellate Court may refuse except in exceptional cases, to interfere with the discretion of the Court below but in ordinary cases, where the only question is whether a *prima facie* case is made out or there is a reasonable and probable chance of conviction, there seems to be little warrant in law to cut down the right of the party by any convention among the judges. If an appeal or second appeal should not, as a matter of principle, lie in sanction cases, that is for the legislature and certainly not for the courts. The Allahabad High Court no doubt, is not troubled by the question of procedure in second appeals as on the construction put by that court on S. 195 Criminal Procedure Code, only one appeal lies. Our court has put a more liberal construction on the section but that cannot affect the rule laid down in the case as to the duty of the Appellate Court even though the appeal is a second appeal.

Padarnath Halwai *v.* **Ram Narain Upadhia,** I. L. R. 37 A. 447 P. C.

What amounts to attestation? Is it necessary that the witness should actually see the faces of the executants or is it sufficient if he sees a hand writing and is able to identify by the voice that the hand is of the alleged executant ? These and many other difficult questions are bound to arise from the strict view taken of the requirements of a valid attestation in *Shamu Pattar* v. *Abdul Kadir* 1, especially when pardanashin ladies are concerned. There is no question that that case has added a new terror to creditors, however

1. (1912) I. L. R. 35 M. 607.

honest their claims. The genuineness of the transaction might be undisputed as it was in this case but it is open to a dishonest debtor, nevertheless, to evade the liability by showing that the attestor was not actually present at the execution or though present did not actually see the execution. In this country where registration is compulsory, it is somewhat difficult to perceive the necessity for such strict rules as regards attestation and it is also somewhat curious that while mortgages require attestation, sales do not. It is no less in the interests of justice that a genuine transaction should not be defeated owing to the ignorance or fraud of the attesting witnesses than that a false transaction should not be passed as a genuine one. It can never be difficult for a dishonestly inclined attestor to make a plausible case of not witnessing the execution without laying himself open to prosecution for a charge of perjury. The crop of cases in which the defence of no proper attestation is raised, shows that the danger is, by no means, an imaginary one. Their Lordships in this case took a practical view of the question and held that the attestation was sufficient.

Whatever may be the rights of a purchaser of a portion of the property against the mortgagee who waives his right as against the other portions of the mortgaged property in a way prejudicial to his rights, the former can have no right when his purchase is subsequent to such prejudicial action of the mortgagee. It was argued in this case that because a prior mortgagee failed to insist upon his priority in a suit by the second mortgagee to which the mortgagor also was a party a purchaser in execution of the decree passed under S. 90 of the Transfer of the Property Act in the suit on the second mortgage was entitled to plead that the prior mortgagee lost his claim against him. Their Lordships negative the contention saying that the purchaser got only the rights of the mortgagor as it existed at the date of his purchase and could not rely upon the mortgagee's earlier laches.

Risal Singh v. Balwant Singh: I.L.R. 37 All. 496:. Though the oral evidence of the widow had been excluded in the Court of the First Instance their Lordships of the Privy Council, with the knowledge of that fact, having proceeded to give a decision "so that further litigation may be happily out of the question" it would really have been a strong thing for the Court to say that there was not "a fair trial of the question" which is all that is

necessary according to the Sivaganga case to make the decision binding on the reversioners. If the decision in the previous case had proceeded on the question of estoppel, the widow might well have been said not to have represented the reversioners but having regard to the course the case took, the conclusion of the majority seems preferable. Having regard to Expl. VI of S. 11 of the Civil Procedure Code it is doubtful whether negligent conduct of the suit if honest, will prevent the reversioner being bound—Cf. S. 3 of the General Clauses Act Cl (20). In the analogous case of the Karnavan, negligence short of fraud has been held not to matter. Fair trial *i.e.* trial at arm's length between the parties is not inconsistent with negligent conduct on the part of the widow though Justice Markby would seem to hold that negligent conduct being inconsistent with her duty to *protect* as well as represent the estate, such a conduct will prevent the decision from operating as *res judicata* (I.L.R. 2 C. 222). In the case of trustees, their Lordships of the Privy Council have laid down the further requirement of "proper issues being raised and decided" though it is not clear whether that is for the purpose of deciding whether the trust was actually represented or for the purpose of deciding whether the trust was effectively represented (L. R. 2 I. A. 145). Possibly, trustees' and minors' cases stand on the same footing which is a somewhat different footing from that of the widow. In the case of minors, gross negligence of the guardian prevents the decision from binding the minor. But why is a party to be said not to have obtained a judgment "fairly and properly" against the widow merely because the widow negligently conducted the suit. The words "fairly and properly" in the Sivaganga case seem to be paraphrased into "*bona fide*" in Explanation VI to Sec. 11. Sir Barnes Peacock understood the rule to be "in the absence of fraud or collusion, a decision against a widow, with regard to her husband's estate, would be binding upon the reversionary heirs." Even in a case like 11 M. I. A. 242 where the widow's default is the basis of the action, it is not clear if their Lordships mean anything more than that the mortgagee might as a matter of caution or to be fair, have made the reversioners parties. It is difficult to read into their Lordships' judgment an absolute disqualification in the widow in such a case to represent the estate. Unless a charge is claimed or the reversioners are made parties, the Court would

not ordinarily treat the decree based on the widow's default as one passed against the widow in her representative character.

Utma Kumar v. Bhagwanta Kuar : I. L. R., 37 A. 515.

Having regard to the view taken by the Privy Council in *Annie Besant's case* [1], it would seem to be necessary to bring all attempts on the part of guardians whether natural or appointed to gain, or regain the custody of their wards within Sec. 12 or Sec. 25 unless one is prepared to say that a particular case is a *casus omissus*. For instance, suppose the father has made over the custody of the child to another and he refuses to hand over the child? Sec. 12, if read with the context, would seem to be inapplicable except to cases of pending applications for appointment of guardians. S. 25 is the only other section bearing on the question and runs as follows: "If a ward leaves or is removed from the custody of a guardian of his person, &c." Unless these words of S. 25 are read in a somewhat extended sense or unless S. 12 is read out of its context and disjunctively, the father would have no remedy. The case under review affords another instance. The mother of a girl who had been appointed a guardian of the person wanted to have the girl from the custody of her elder sister who had taken her away before the proceedings. The application was made after the proceedings were over and as such S. 12 strictly read could not apply. It was difficult also to bring it within S. 25 as the ward could not be said to have left or been removed from the custody of the guardian. Their Lordships nevertheless hold that either S. 12 or S. 25 applied to the case and the Court had power to direct the handing over of the child.

Janki Kuar v Lachimi Narain. I. L. R., 37 A. 535.

The point at issue in this case, whether a judgment could be vacated on the ground that it was obtained by false and perjured evidence, has been elaborately considered in *Chinnaya* v. *Ramanna* [2] and the view taken in this case is the same as the judges were inclined to take in that. As pointed out in that case, fraud must be extrinsic and collateral and it is difficult to see how the very issue necessarily involved in the case namely whether a party's witnesses are lying or not can be reagitated by giving it

1. (1914) 27 M. L J. 30. 2. (1913) I. L. R. 38 M. 203,

the name of fraud. It must be confessed however, that the English authorities are not quite as easily distinguishable as is assumed in this case and also that the line between fraud that vitiates a judgment and fraud that does not, must in some cases at least be very thin.

Munna Lal Parrack *v.* Sarat Chunder Mukerji I. L. R. 42 C. 776 (P. C.)

The brevity of their Lordships' judgment in this case throws us back upon the judgment of the High Court, *Amlook Chand* v. *Sarat Chunder* [1] which they affirm. As there pointed out by *Jenkins*, C. J. it was hoped that the changes introduced by the Code of 1908 would end the conflict of decisions as to (i) whether an application for an order under S. 89 of the Transfer of Property Act was an application in execution or not and (ii) as to the rule of limitation in respect of such an application. The first question may now be regarded as settled; but this has not led to a similar certainty of law as to the second. Sir Lawrence Jenkins evidently expected that the opinion expressed in *Madhab Mani Dasi* v. *Lambert* [2] on the question of limitation would not be followed under the new Code, but in *Biswambhar Shaha* v. *Ram Sundar* [3] Holmwood and Chapman, JJ, adhered to that opinion, though the actual question there arose with reference to an application for a supplemental decree under O. 34 R. 6. The extreme view that prevailed in the Calcutta High Court that applications under S. 89 of the Transfer of Property Act were subject to no legal rule of limitation must be taken to have been overruled by the decisions of the Judicial Committee in *Abdul Majid* v. *Jawahir Lal* [4] and *Batuk Nath* v. *Munni Dei* [5] though in both these cases it was assumed that Art. 179 of the old Limitation Act would apply (see however the reasons assigned in *Rangiah Gounden* v. *Nanjappa* [6] for applying Art. 178 in preference to Art. 179). And the decision in *Ashfaq Husain* v. *Gauri Sahai* [7] cannot, in view of the later decisions, be understood to lay down either that an application for an order absolute (prior to the new Code) was not a proceeding in execution or that no rule of limitation applied to it. The question there arose in proceedings after order absolute.

1. (1911) I. L. R. 38 C. 913.
2. (1910) I. L. R. 37 C. 796
3. (1914) I. L. R. 42 C. 294.
4. (1914) I. L. R. 36 A. 350
5. (1914) I. L. R. 36 A. 284.
6. (1902) I. L. R. 26 M. 780.
7. (1911) I. L. R. 33 A. 264 (P. C.)

But it is difficult to say that these decisions of their Lordships or even the decision under notice can be held to govern applications for a 'final decree' under Rules 3, 5 Or. 8 of O. 34 of the new Code or a supplemental decree under rule 6. It is however noteworthy that even the Calcutta High Court has now come to hold that applications for a decree absolute under O. 34 C. P. C. are governed by Art. 181 of the Limitation Act of 1908. (*Beni Singh* v. *Berhamdeo Singh* [1], the case of *Kista Bar* v. *Srimati Banamoyi Devia* [2] though reported in the same volume was decided so long ago as May 1914 and the question there arose under the old Code: it may therefore be left out of account. The views of the other High Courts will be found in *Thathara Nannabha Chetti* v. *Kuppal Krishnammal* [3], *Rama Venkatasubba Iyer* v. *Shanmukam* [4], and *Madhoram* v. *Netal Singh* [5], *Datto Atmaram* v. *Shankar Dattatraya* [6]. The dictum in *Dhoki Khodalo Patra* v. *Vidya Bhushana* [7] that no rule of limitation governs an application to pass a final decree in a pending suit is not likely to be followed hereafter. As to the decision in *Singaravalu Pillai* v. *Santhana Krishna Mudaliar* [8] we cannot help feeling that there is some error in the statement that the decree was *after* the new Code came into force. The decision in *Madhoram* v. *Netal Singh* [5] raises an interesting question as to the starting point for limitation in cases in which the preliminary decree is appealed against. With regard to applications for supplemental decree under O. 34 R. 6, the question of limitation cannot yet be regarded as settled by authority, *Rama Venkata Subba Iyer* v. *Shanmukham* [4] being directly in conflict with *Bisvambhar Shaha* v. *Ram Sundar* [11].

Kunja Lal Banerji *v.* Narasamba Debi I. L. R. 42 C. 826.

The extent to which the rule of Damdupat is still in force is a matter of some uncertainty. It is also anomalous that on a question of this kind, there should be a difference between one Presidency and another or that the law should be one thing for the presidency town and another for the mofussil. The suggestion for removal of the anomaly by the legislature, made so early as

1. (1915) 19 C. W. N. 473.
2. (1914) 19 C. W. N. 470.
3. (1913) 14 M. L. T. 194.
4. (1913) M. W. N. 867.
5. (1915) 13 A. L. J. 985.
6. (1914) I. L. R. 38 B. 32.
7. (1918) 22 I. C. 283.
8. (1915) M. W. N. 643.
9. (1914) I. L. R. 42 C. 294

in *Nobin Chunder's case* [1] has not so far been heeded. The reasoning in the *Madhwa Siddhanta Onnahini Nidhi's case* [2] that, so far as mortgages are concerned, the application of the rule of Damdupat is precluded by the language of the sections of the Transfer of Property Act dealing with mortgage decrees, does not seem to us altogether convincing; and it remains to be seen whether the Madras High Court will continue to follow it, even after the legistation of 1908, by which the sections of the Transfer of Property Act there relied on have been removed to the Code of Civil Procedure, which cannot reasonably be construed as abrogating any rule of *substantive* law. We are, however, unable to appreciate the argument based, in the case under notice, on S. 4 of the Transfer of Property Act. That only enacts that the provisions in the Act which relate to contracts shall be taken as part of the Contract Act. It is difficult to say that Ss. 86, 88 and 92 of the Transfer of Property Act—which are relied on in the Madras case—'relate to contracts' within the meaning of this provision.

Ahid Khondkar *v.* **Mahendra Lal** De. I. L. R. 42 C. 830.

With all respect, we beg leave to differ from the view here taken as to the power of an Appellate Court in dealing with an order granting a review on the ground of the discovery of new evidence. When the legislature was particular to make such an order of a Subordinate Court appealable, it seems to us practically defeating its intention, to say that the Appellate Court has only to see if there was 'legal' evidence before the first court, *whatever its probative value*, of circumstances justifying a review. In the view taken by the learned Judges, the word 'strict' would have been altogether unnecessary; for the wood 'proof' when used with reference to a court of law, would of itself have signified proof in such *form* as is allowed by the law of evidence. It is true that as a general principle it is the Court of First Instance that is to decide whether there should be a review or not; and in one class of cases, *viz.*, where the review is granted for 'other sufficient cause, the discretion of that court has been held to be nearly absolute See *Tholan* v. *Kunhi Kutti* [3], *Gopala Iyer* v. *Ramaswami Sastrial* [4], *Ali Akbar* v. *Kurrbad Ali* [5], *Harickaran Saha* v. *Baran*

1. (1887) I. L. R. 14 C. 781.
2. (1903) I. L. R. 26 M. 662.
3. (1912) 24 M. L. J. 93
4. (1907) 17 M. L. J. 603
5. 27 All. p. 395.

Khan [1], *Muni Ra Rani Choudhri* v. *Bishen Prakash Narain* [2]

But this won't justify the view that even in so far as the specified causes are concerned and to the extent to which an appeal is expressly allowed, the functions of the Appellate Court are to be unduly circumscribed on the strength of this general principle.

[*End of Vol. XXIX.*]

1. (1914) I. L. R. 41 C. 716. 2. (1897) I. L. R., 24 C. 878.

NOTES OF RECENT CASES.

Seshagiri Iyer and Napier, JJ.
1915 August, 3.

S. A. 2523 of 1913 and
S. A. 290 of 1914.

Estates Land Act—Ss. 145, 151, & 152—Award of compensation—Existence of relation of landlord and tenant, thereafter—Material injury to the holding, a finding, of fact—Injury to a part of the holding—Finding that the holding as a whole, was materially injured, a finding of fact.

The compensation awardable in favour of the landholder under Ss. 151 and 152 of the Estates Land Act on account of material injury to the holding by a tenant, is only for the injury done to the holding as an agricultural holding. It does not include the value of the landholder's right in the land, and hence the award does not put an end to the relationship of landlord and tenant, which continues even thereafter on the same terms as before.

A finding under S. 151, that the holding has been materially injured is a finding of fact. Though the tenants of a single holding sub-divide the holding among themselves, the sub-division is not binding upon the landholder unless he assents to the same.

A finding that a holding as a whole has been materially injured even though a portion of it alone has been built upon by one of such tenants is a finding of fact.

N. Rajagopalachariar for the landholder.

C. S. Venkatachariar for the tenant.

Wallis, C. J.
Sadasivayar and Srinivasayangar, JJ.
1915 August, 3.

A. S. No. 83 of 1913.

Court Fees Act (VII of 1870) S. 7, Sub-sec. 4—Suits under—Valuation in the plaint if determines fee payable on appeal.

In suits coming under S. 7, Sub-sec. (4) of the Court Fees Act, when the plaintiff has valued the relief prayed for and ob-

tained a decree, (in this instance, a preliminary decree for accounts) and the defendant appeals against the whole decree, the latter is bound by the valuation in the plaint.

Samiya Mavali v. *Minammal* [1], followed.

K. Bhashyam for Appellant.

T. V. Venkatarama Iyer for Respondent.

Wallis, C. J.
Sadasiva Aiyar and
Srinivasa Ieyngar, JJ.
1915 August, 4

S. A. No. 1098 of 1914.

Madras Estates Land Act (I of 1908) Ss. 213, 189 and 134—Ryotwari Land—Excessive distraint—Suit for damages jurisdiction—Revenue Court.

A suit by the tenant of a ryotwari land-owner or of any sub-tenant of such, for damages for illegal distraint of moveable property, or growing crops in a defaulter's holding is cognizable solely by the Revenue Court.

N. Srinivasachariya for Appellant.

L. A. Govindaraghava Iyer for Respondent.

Srinivasa
Iyengar, J.
1915 August, 2

C. R. P. 884 of 1914.

Transfer of Property Act, S. 55 (2)—Mortgage-debt, transfer of—Covenant for title—Breach—Damages—Limitation Act, Art. 116—Cause of action, when arises.

In the case of a transfer of a mortgage-debt there is no covenant for title implied by the Statute, as in the case of a transfer of immoveable property.

Obiter: The cause of action for damages for breach of a covenant for title, in the case of a registered conveyance, arises on the date of the execution of the conveyance.

A. V. Visvanatha Sastri for Petitioner.

K. S. Jayarama Iyer for Respondent.

---

1. (1889) I.L.R. 23 M. 490.

NOTES OF RECENT CASES.

Seshagiri Aiyar J.
Napier, J.
1915 August, 3.

S. A. 2378 of 1913.

Hindu Law—Religious Endowment—Temple—Introduction of new idol, if a breach of trust.

The introduction of a new stone idol of Vigneswara, by some of the trustees of a temple dedicated solely to the worship of a Goddess, does not constitute a breach of trust.

G. S. Venkatarama Aiyar for Appellants.

V. Purushotama Aiyar for Respondents.

Ayling, J.
Tyabji, J.
1915 August, 5.

S. A. 1045 of 1907.

Specific Relief Act, S. 42—Suit for declaration—Possession with life-tenant—Nature of possession in dispute—Cause of action—Co-owners—Knowledge of denial of title—Limitation Act, Art. 120.

A suit for a declaration that the defendant's possession is merely that of a life-tenant and that the plaintiffs' community is entitled to the properties is maintainable. The period of limitation for a suit for declaration of title starts from the date when the plaintiff first becomes aware of the denial of his title by the defendant.

Knowledge of denial of title on the part of some of several co-owners does not affect the rest.

Semble: If the majority of the co-owners had knowledge of the denial of title more than 6 years prior to a suit for declaration of title by the rest of them, the court may refuse to exercise its discretion in granting a declaration under S. 42 of the Specific Relief Act.

G. S. Ramachandra Aiyar for Appellants.

T. R. Ramachandra Aiyar for Respondents.

Ayling J.
Tyabji, J.
1915 August, 6.

Cr. Rev. Cas. Nos. 3 & 28 of 1915.

Criminal Procedure Code, S. 345—Compromise in Revision, Sanction for—High Court's powers.

Under S. 345 of the Criminal Procedure Code, the High Court has no power to sanction a compromise of a criminal case in revision against a conviction.

32 A. 153 dissented from.

T. Ramachandra Rao and *Rao Sahib G. Venkataramiah* for Petitioners.

Public Prosecutor *contra.*

Spencer J.
Kumaraswami Sastri, J.
1915 August, 10.

S. A. 2649 of 1913.

Limitation—Adverse Possession—Hindu Widow—Adverse Possession against—Effect on rights of reversion—Limitation Acts of 1871, 1877 and 1908.

Under the Limitation Acts of 1871, 1877, and 1908, possession which is adverse to a Hindu Widow is not adverse to the reversioners.

B. Sitarama Rao for Appellant.

K. Sundara Rao for Respondent.

Seshagiri Aiyar J.
Napier, J.
1915 August, 10.

C. M. A. 2 of 1915.

Hindu Law—Adoption—Joint Family—Divesting, Rule of.

A. and B. were undivided brothers forming a joint Hindu family. A died in 1907 issueless giving his widow authority to adopt. B. died in 1909 leaving a son. In 1911 the widow of A adopted C. *Held,* that the adoption was valid and that C. was entitled to a moiety of the property in the hands of B.'s son.

Madana Mohana Deo v. *Purshotam Deo* [1] followed.

G. S. Ramachandra Aiyar for Appellants.

A. Krishnaswami Aiyar for Respondents.

---

1. (1914) 27 M. L. J. 306.

Spencer J.
Kumaraswami Sastri, J. — S. A. 2355 of 1913.
1915 August, 10.

Landlord and Tenant—Mulgeni tenants—Right to cut and appropriate trees.

Mulgeni tenants in South Canara are entitled to cut and appropriate for their own use trees spontaneously grown as well as trees planted by themselves during the currency of their lease.

K. Ramanatha Shenai for Appellant.

B. Sitarama Rao for Respondent.

Seshagiri Aiyar J.
Napier, J. — S. A. 1589 of 1913.
1915 August, 10.

Lease—Forfeiture for non-payment—Court's power to relieve against—Period of grace allowed in lease—Effect.

Courts have power to relieve against forfeiture for non-payment of rent though even there is a period of grace allowed in the lease-deed.

B. Sitarama Rao for Appellant.

K. Ramanatha Shenai for Respondent.

Coutts Trotter J.
Srinivasa Aiyangar J. — A. S. 280 of 1913.
1915 August, 20.

Judgment—Not inter-partes*—Effect of—Hereditary Office—Adverse possession against widow—Suit by reversioner—Limitation Act, art. 124, 141.*

A judgment or decree declaring A's. title to certain property as against B., the only other possible claimant at the time, will operate as a root of title against C. who is a subsequent squatter on the property.

Per Srinivasa Aiyangar J. The judgment has the effect of a conveyance by B., in favour of A., though not open to attack on grounds on which a conveyance can be attacked. The judgment can be attacked only on the ground of want of jurisdiction in the court or on the ground that it was obtained by fraud. A plea that the judgment is erroneous in law, in that it recognises the legality of the alienation of a religious office, is not one affecting the jurisdiction of the court.

Quaere: Whether a judgment which is obtained against some out of several legal representatives is binding on the others, not parties to the litigation.

Where a widow who is the incumbent of a hereditary office is dspossessed, a suit for possession of the office by the reversioner is governed by art. 124 and not by art. 141 of the Limitation Act. Adverse possession against the widow, of a hereditary office, for the Statutory period bars the reversioners. Enjoyment of the emolments of the office as well as performance of its duties to the exclusion of others is necessary to confer a title to the office by prescription.

Per Srinivasa Aiyangar J.: Where a person entered into possession of an office on behalf of himself and his minor brother, and the emoluments of the office were enjoyed by both, but the elder brother performed the duties of the office exclusively, *held*, that the elder brother alone acquired the right to the office.

A. Krishnaswami Aiyar for Appellants.

T. Narasimha Aiyengar and *C. S. Venkatachariar* for Respondents.

Spencer J.
Kumaraswami Sastri J.
1915 August, 20.

S. A. 646 of 1913.

Mortgage—Consideration—Right of person in possession to question—Onus of proof—Mortgage without consideration—Effect.

Where a person is in possession of property purchased by him in execution of a mortgage decree, it is open to him to show that another mortgage which is sought to be enforced against the property is without consideration. The onus of proving consideration in such a case is on the person seeking to enforce the mortgage. A mortgage without consideration is a nullity and confers no right on the mortgagee.

23 I. C. 805 followed.

C. V. Ananthakrishna Iyer and *K. R. Rangaswami Iyangar* for Appellants.

T. V. Muthukrishna Iyer for Respondents.

NOTES OF RECENT CASES.

Seshagiri Aiyar and Napier, JJ. 1915 August, 12. — C. M. S. A. 19 of 1914.

C. P. C. of 1908—O. 21, R. 57—Applicability—Decree—Execution application—Dismissal in consequence of order of appellate Court staying execution—Revival of application after 12 years from date of decree.

O. 21, R. 57 of the Code of Civil Procedure, 1908, does not apply to cases in which there is no default on the part of the decree-holder.

Where an execution application is dismissed in consequence of an order of the appellate Court staying execution, it can be revived even after the lapse of 12 years from the date of the decree.

P. S. Narayanaswami Aiyar for *C. V. Anantakrishna Aiyar* for Appellants.

S. Ranganatha Aiyar for Respondents.

Spencer and Seshagiri Aiyar, JJ. 1915 August, 17. — S. A. 551 of 1913.

Hindu Law—Widow—Alienation—Compromise—Validity—Distinction—Compromise by daughter and her son, sole reversioners at time of compromise—Validity.

A compromise to which a Hindu daughter and her son, the sole reversioners at the time, were parties constitutes an alienation by the daughter with the consent of the next reversioner and as such is binding on the estate.

On principle there is no distinction between a compromise and an alienation by a Hindu widow.

G. Venkataramiah for Appellant.

P. Narayanamurti for Respondent.

Sadasiva Aiyar, J.
and Napier, J.
1915 August, 13.

S. A. 1257 of 1913.

Deed—Construction—Release or conveyance—Test.

Where the question was as to whether an instrument styled a release was a release-deed merely or operated to pass title to the person in whose favour it was executed and it appeared that the deed recited a sum of Rs. 2,000 as consideration for the release and the intention of the executant was clear that the other party should enjoy the property covered by the deed as owner, *held*, that it operated to pass title.

B. Somayya for *P. Narayanamurti* for Appellant.

G. Venkataramiah for Respondent.

Wallis, C. J.
Sadasivayar and
Srinivasayangar, JJ.
1915 August, 21.

S. A. 19 of 1913.

Adverse possession—Simple mortgage—Adverse possession against mortgagor, not adverse to mortgagee.

Adverse possession by a stranger for more than 12 years of a property, which is subject to a hypothecation, does not extinguish the rights of the mortgagee.

Ramasami Chetty v. *Ponna Padayachi* [1]. Dissented from.

G. S. Ramachandra Iyer for Appellants.

C. Padmanabha Iyengar for the Respondent.

---

1. (1910) I. L. R. 36 M. 97.

NOTES OF RECENT CASES.

Spencer, J.
Coutts Trotter, J.
1915 August, 27.

S. A. 1636 of 1912.

Service Inam—Enfranchisement—Effect of—Mortgage prior to enfranchisement—Validity—Hindu Law—Inheritance—Property inherited from maternal grandfather—Nature of—Right therein of son of person inheriting.

The effect of enfranchisement of a Service Inam (in this case, a Bariki Service Inam) is to make the Inam the joint family property of the joint family of which the office-holder is a member and not to make it the self-acquisition of the office-holder himself.

26 M. 339 followed.

Property inherited by a person from his maternal grandfather is ancestral property in his hands so as to give an interest in it to his son.

27 M. 382 followed.

29 A. 667 Dissented from.

A mortgage of a Service Inam prior to its enfranchisement is void and cannot be relied upon for any purpose.

Hon. B. N. Sarma for Appellant.

V. Ramesam for Respondent.

Ayling and Tyabji JJ.
1915 *August, 31.*

S. A. No. 1192 of 1913.

Decree—Setting aside—Arbitration—Decree on Award—Minor not bound, in the absence of leave of court.

A minor though a party to the suit, is not bound by a decree passed in pursuance of an award of arbitrators, appointed by the consent of parties, unless the leave of the court has been recorded.

V. Ramadoss for Appellant.

P. Nagabushanam for Respondent.

Sadasivayar and Napier, JJ.
1915 August, 31.

S. A. 2672 of 1913.

Ejectment—Possessory title—Effective against trespasser.

A person who had been in peaceable possession of property without title, though only for a short time, is entitled to recover possession of the property from a subsequent trespasser who forcibly dispossesses the former.

S. Duraisami Iyer for Appellant.

S. Ranganatha Iyer for Respondent.

Ayling and Tyabji, JJ.
1915 August, 31.

S. A. 2859 of 1913.

Hindu Law—Gift by husband to wife—"Sarvaswathanthramai", meaning of—Interest taken by wife.

The ordinary presumption of Hindu Law is that gift by a husband to his wife confers only a life-estate upon her. The mere use of the words 'Sarvaswanthramayi' is insufficient to confer an absolute estate on the wife, especially where the surrounding circumstances do not evidence such an intention.

S. Krishnamachariar for Appellant.

T. V. Gopalaswami Mudaliar for Respondent.

Ayling and Tyabji, JJ.
1915 August, 31

S. A. 2726 of 1913.

Transfer of Property Act, Ss. 83 and 84—Deposit—withdrawal of application for service of notice on mortgagee—Delay of Court—No cessation of interest.

Where a mortgagor deposited the amount due in Court, but withdrew his application for service of notice on the mortgagees before all of them had been served. *Held,* that there was no valid tender so as to stop the running of interest.

B. Narasimha Row for Appellant.

P. Somasundaram for Respondent.

NOTES OF RECENT CASES.

Sadasiva Aiyar and Napier, JJ. 1915 August, 31. — Ref. case 1 of 1914.

C. P. Code, O. 2 R. 2—Not applicable to Village Munsiff's Courts.

The provisions of the Civil Procedure Code have no application to the Court of a Village Munsiff. O 2 R. 2 of the Civil Procedure Code, does not bar a suit on a cause of action in a Civil Court though a portion of the claim in respect of the same cause of action had been sued for in a Village Munsiff's Court.

Spencer and Seshagiri Iyer, JJ. 1915 September, 1st. — S. A. 237 of 1914.

Madras Estates Land Act, Ss. 3 (5) and 161—Lessee of estate —Arrears of rent due before expiry of lease—Sale of ryot's holding after expiry of the lease—Lessee not in possession.

A lessee of an estate cannot, after the expiry of the lease and after he has ceased to be the landlord in possession, sell the ryot's holding for recovery of arrears of rent due to him while he was the landholder in possession.

M. D. Devadoss for Appellant.

S. Ramaswami Iyer for Respondent.

Sadasivayar and Napier, JJ. 1915 September, 3. — Ref. case 3 of 1914.

Presidency Towns Insolvency Act, S. 17—'other legal proceeding', meaning of—Application for warrant of arrest of judgment-debtor—Security taken on such application void.

An application for execution comes within the "other legal proceeding" in S. 17 of the Pres Towns. Insolvency Act. After the judgment-debtor has been properly adjudicated an insolvent, it is not competent to a Small Cause Court to order the debtor to furnish security on an application for the arrest of the debtor, in execution of a decree against him.

P. Venkataramana Rao for Appellant.

W. V. Rangasami Iyengar for Respondent.

Wallis C. J. &
Seshagiri Iyer, J.
1915 September, 6.

A. S. 98 of 1913.

Hindu Law—Inheritance—Sudras—Adopted son and aurasa *son, Shares of—Partition decree—Provision for marriage.*

Under the Hindu Law, even among Sudras, an adopted son in competition with a subsequently born *aurasa* son gets only a fifth of the estate. In a partition decree, provision can be made for the marriage expenses of unmarried male co-parceners.

V. Ramadoss for Appellant.

P. Narayanamurti for Respondent.

Sadasivayar and
Napier, JJ.
1915 September, 6

L. P. A. No. 16 of 1913.

Civil Rules of Practice, R. 49 (1)—Appeal—Non-production of printed copy of judgment—Presentation of appeal with manuscript copy of judgment, valid.

The presentation of an appeal to the District Court with a certified manuscript copy of the judgment of the lower Court is not invalid.

C. S. Venkatachariar for Appellant.

M. D. Devadoss for Respondent.

Sadasiva Aiyar
and Napier, JJ.
1915 September, 6.

L. P. A. No. 258 of 1914.

Transfer of Property Act, S. 54—Unregistered sale-deed of immoveable property of less than Rs. 100 in value—Admissible in evidence, when.

An unregistered sale-deed of immoveable property of the value of less than Rs. 100, in pursuance of which the vendee takes possession of the property, is admissible in evidence to prove the agreement for sale and the passing of possession thereunder.

T. Prakasam for Appellant.

P. Narayanamurti for Respondent.

Tyabji and
Phillips, JJ.
1915 September 7.

S. A. 2423 of 1913.

Civil Procedure Code, Sch. ii, para 16—Arbitration—Reference—Want of consent of one of the defendants—Award—Decree, if binding on defendant not a party to the reference.

Per Tyabji, J.—A defendant who was not a consenting party to a reference to arbitration, is not bound by the award and the decree passed thereon, and he is entitled to have the decree set aside so far as he is concerned.

Per Phillips, J.:—If a defendant has voluntarily left the conduct of the defence in the hands of other defendants and there has been an arbitration to which the other defendants consented, the former is also bound by the decree passed in accordance with the award.

T. R. Venkatarama Sastri for Appellant.

T. V. Gopalasami Mudaliar for Respondent.

Wallis, C. J. & Srinivasayangar, J. 1915 September, 7. — C. M. P. 1682 of 1915.

Civil Procedure Code, Ss. 109 & 110—Privy Council—Leave to appeal—Value of the subject-matter—Test.

The value of the subject-matter of a suit for the recovery of immoveable property in the court of first instance was less than Rs. 10,000. The High Court, on appeal, decreed the suit with mesne profits. At the date of the decree of the High Court the original value together with the mesne profits allowed by the decree, amounted to more than Rs. 10,000. *Held*, that the case did not fulfil the requirements of the first clause of S. 110, C. P. Code, and that leave to appeal to the Privy Council could not be given. The scope of S. 110, C. P. Code, explained.

T. R. Ramachandra Iyer, and *G. S. Ramachandra Iyer*, for Petitioner.

R. Kuppusami Iyer, for Respondent.

Sadasiva Aiyer and Napier, JJ. 1915 September, 8. — L. P. A. 375 of 1914.

Evidence Act, S. 116—Estoppel—Landlord and Tenant—Attornment, Effect of—Denial of title.

S. 116 of the Evidence Act applies only to a case where the person claiming to be the landlord actually let the tenant into possession.

Where a tenant already in possession of land attorns to another, he is not estopped from denying the title of the latter.

T. R. Venkatarama Sastri for Appellant.

K. S. Ganesa Iyer for Respondent.

Sadasivayar and Napier, JJ. 1915 September, 9. C. R. P. 871 of 1913.

C. P. Code, S. 115—Revision—Religious Endowments Act S. *10—Appointment of member to fill vacancy in the committee—Nature of proceedings.*

Where a District Judge appoints a person to fill up a vacancy in the Committee under S. 10 of the Religious Endowments Act, his proceedings do not constitute "a case decided" within S. 115, C. P. Code. The District Judge is not bound to to take evidence in proceedings under S. 10. of the Religious Endowments Act and it is not competent to the High Court to interfere in revision with the appointment by the District Judge, on that ground.

T. R. Ramachandra Iyer for Petitioner.

S. Srinivasayangar and *K. Rajah Iyer* for Respondent.

Coutts Trotter, J. K. S. Iyangar, J. 1915, September 20. A. S. 98 and 223 of 1910.

Hindu Law—Mortgage by grandfather for immoral debts—Onus on grandson of proving creditors knowledge of immoral character of debts.

In a suit by a son or grandson of a Hindu to set aside a mortgage by his father or grandfather on the ground that the debt for which mortgage was created was for immoral purposes, the plaintiff is not only bound to show the connection between the defendant and the immorality but he should also show that the creditor knew that the amount borrowed was to be utilised for the immoral purpose.

Maharaj Singh v. *Balwant Singh* [1], and *Chandra Deo Singh* v. *Mata Prasad* [2], not followed.

N. Rajagopalachari for the Appellant.

M. O. Parthasarathy Aiyangar and *T. Rangachariar* for the Respondent.

---

1. (1906) I. L. R. 28 A. 508, at 529 and 541.
2. (1909) I. L. R. 31 A. 176 F. B. at 196.

NOTES OF RECENT CASES.

Sadasiva Ayar and Napier, JJ. 1915, September 22. — C. M. A. No. 313 of 1913.

Civil Procedure Code, O. 34 R. 8—Preliminary decree by Appellate Court—Extension of time for payment of mortgage money—Application to be made to the Court of first instance—Order extending time, if appealable.

There is no appeal against an order extending the time fixed for payment of the mortgage money in a preliminary decree for redemption. Even where the preliminary decree has been passed by the Appellate Court, an application for extention of the time fixed for payment of the mortgage money should be made only to the Court of first instance. The application in this case having been made to the Appellate Court, the High Court directed the Appellate Court to return the application to be presented to the Court of first instance.

S. Varadachariar for Appellants.

G. S. Ramachandra Aiyar for Respondents.

Coutts-Trotter and Srinivasa Ayangar, JJ. 1915, October 12. — A. S. No. 47 of 1914.

Hindu Law—Joint Family—Release by one member—Formalities.

It is competent to a member of a joint Hindu family to relinquish his interest in the family properties orally, without any instrument in writing registered.

T. R. Venkatarama Sastri, for the Appellant.

G. S. Ramachandra Aiyar, for Respondents.

Sir John Wallis, Chief Justice, Sadasiva Aiyar, J. Seshagiri Aiyar, J. 1915, October 14. — FULL BENCH. A. S. No. 74 of 1911. and L. P. A. 51 of 1914.

Hindu law—Joint family—Unambiguous declaration by one member to be separate from the others—Whether effects a severance of the Status of joint family—Filing of a plaint by one member for his share—operates as a severance.

A definite and unambiguous indication by one member of a joint family of intention to separate himself, from the others and

enjoy his share in severality effects a severance of the status of the joint family so far as he is concerned irrespective of the consent of the other members.

I. L. R. 35 A. p. 80 followed.

A plaint in a suit for partition by one member of a joint family asking for his share operates as a severance of the joint family.

K. N. Aiya, for the Appellant in A. S. 74 of 1913.

B. Sitarama Rau, for the Respondents.

A. Krishnaswami Aiyer, for the Appellants.

S. Srinivasa Aiyangar, G. S. Ramachandra Aiyar, for the Respondents.

Wallis, C. J.
Abdur Rahim and
Seshagiri Iyer, JJ.
1915, October 18.

FULL BENCH.
A. S. No. 327 of 1913.

Registration Act Ss. 17 (b) and 49—Petition to Collector—Recital of gift — Petition, if admissible in evidence, without registration.

A petition to the Collector for change of patta in the name of the donee of certain properties, though it contains a recital about the gift having been previously made, does not require registration. Therefore S. 49 of the Registration Act does not render it inadmissible in evidence.

N. Chandrasekhara Iyer for Appellant.

T. Narasimha Iyengar for Respondent.

Wallis, C. J.
Abdur Rahim, J.
and Seshagiri Iyer, J.
1915, October 18.

FULL BENCH.
S. A. No. 242 of 1914.

Madras Act (III of 1905) Ss. 7 and 14—Notice by Government under S. 7—Cause of action—Limitation.

A mere notice by Government under S. 7 of Madras Act III of 1905, does not give a cause of action to the person on whom it is served. If, however, any effective proceedings are taken under the Act, any suit for any relief based on such proceedings must be brought within 6 months from the date of such proceedings.

The Government Pleader, for Appellant.

C. V. Anantakrishna Iyer, for Respondent.

NOTES OF RECENT CASES.

Ayling, J.
1915 October, 4. — Cr. R. C. No. 368 of 1915.

Criminal Procedure Code—Ss. 145, 147—Applicability—Dispute relating to management of temple and right to do pooja therein if within scope of section.

A dispute relating to the management of a temple and the right to do pooja therein is not covered by S. 147 of the Criminal Procedure Code.

[27 M. L. J. 587, 29 M. 237, 11 M. 323, 24 B. 527, dissented from.]

[37 C. 578 followed].

Such a dispute may be brought under S. 145 of the Code; and the Magistrate in awarding possession to one of the parties is not bound to find inclusive possession in his favour but may reserve certain possessory rights to the other party.

A. Anantarama Aiyar for Petitioner.

Public Prosecutor and *T. Narasimha Aiyangar* for Counter-petitioner.

Abdur Rahim and Spencer, JJ.
1915 October, 4. — C. M. S. A. No. 18 of 1914.

Execution of decree—Limitation—Uncertified part-payment if can be relied upon to save—Statement in execution application of a prior part-payment if sufficient compliance with O. 21 R. 2 of Civil Procedure Code.

A decree-holder in order to escape the bar of limitation may rely upon a part-payment made within three years prior to his execution application, though such part-payment had not been certified before the execution application. The statement in the execution application of the prior part-payment is sufficient compliance with O. 21 R. 2 of the Code of Civil Procedure.

K. Narayanaswami Aiyar for *T. Natesaiyar* for Appellant.

S. Varadachariar for Respondent.

Spencer and Phillips, JJ. 1915 October 12. S. A. No. 591 of 1914.

Evidence Act S. 92 (4)—Mortgage—Discharge by subsequent oral sale, if can be pleaded—Possession of mortgagee, if adverse, after sale.

Per *Spencer, J. (Phillips, J.) contra.* It is not permissible to prove a discharge of a registered mortgage, by an oral sale of a portion of the mortgaged property. The possession of the vendee after such oral sale, is only that of a mortgagee, and is not adverse to the mortgagor.

23 M. L. J. 339 referred to.

G. S. Ramachandra Iyer for Appellant.

P. Narayanamurti for Respondent.

Sadasiva Aiyar and Napier, JJ. 1915 October, 14. O. S. A. No. 98 of 1913.

Presidency Towns Insolvency Act, 1909—S. 56—Fraudulent Preference—Payment to accommodation acceptor of hundy drawn against him.

Payment by an Insolvent to an accommodation acceptor of a hundy drawn against the latter is not a payment to a "creditor" within the meaning of the Presidency Towns Insolvency Act so as to make it a fraudulent preference.

Where the Insolvent drew a hundy in favour of his daughter and the drawee paid the amount after an act of bankruptcy committed by the Insolvent but before adjudication, *Held* the payment could not be set aside and the authority was not revoked by the mere act of insolvency.

L. A. Govindaraghava Aiyar, T. Ramachandra Rao and *A. N. Sitarama Sastri* for Appellant.

M. D. Devadoss for Respondent.

Abdur Rahim and Spencer, JJ. 1915 October, 18. C. M. A. No. 351 of 1914.

Mesne Profits—Interest on—Decree providing for interest on past but not on future mesne profits—Discretion of Court to allow or not interest on profits after 3 years from date of decree.

Where a decree provided for interest on past mesne profits but did not provide for interest on mesne profits for the period

subsequent to suit, *held* that the Court had a discretion to allow or not interest on mesne profits after 3 years from the date of the decree.

[27 C. 951 P. C., referred to.]

[33 C. 329 ; 12 C. W. N. 285 considered.]

S. Muthiah Mudaliar for Appellant.

T. Narasimha Aiyangar for Respondent.

Ayling and Phillips, JJ.
1915 October 22.

Crl. M. Petn. No. 342 of 1915.

Criminal Procedure Code S. 195—Perjury—Contradictory statements in depositions—Sanction to prosecute.

Where there are two radically contradictory statements in two distinct depositions by the same person, there is no *locus penitentiae* to the deponent and a sanction for prosecution of the deponent for perjury ought to be given.

The Crown Prosecutor for Petitioner.

S. Gurusami Chetti for Counter-petitioner.

Ayling and Phillips, JJ.
1915, October 22.

S. A. No. 1082 of 1913.

Landlord and Tenant—Payment of enhanced rent for a long time—Presumption—Implied Contract—Consideration—Custom—Change of case on appeal, not to be allowed.

Where a landlord sues for enhanced rent on the basis of a custom, he cannot, on appeal, rely on an implied contract to pay the rent, inferable from the payment of such rent for a long period of time.

Payment for a number of years of enhanced rent, may be evidence of an *agreement* to pay at that rate, but there is no irrebuttable presumption that the agreement was also supported by consideration, so as to make it a binding contract for all time.

28 M. 444; 28 M. L. J. 136, referred to.

S. Sundararaja Aiyangar for Appellant.

N. Chandrasekhara Iyer, (with) *A. Krishnaswami Iyer* for Respondent.

The Chief Justice, Abdur Rahim and Seshagiri Iyer, JJ. 1915, October 22. — C. R. P. No. 338 of 1914.

Limitation Act, Art. 80—Promissory note—Covenant not to sue for a limited time—Limitation, when commences—Covenant if a bar to a suit within the time.

When a promissory note payable on demand is accompanied by a writing fixing the time for payment, limitation as between the parties commences to run only after the expiry of the period fixed, under Art. 80 of the Limitation Act.

A covenant accompanying a promissory note, not to sue for a limited time, is a bar to a suit on the promissory note within that time.

Somasundaram Chettiar v. *Narasimhachariar* [1], overruled.

B. Sitarama Rao for Petitioner.

S. Ranganadha Iyer for Respondent.

The Chief Justice and Seshagiri Aiyar, J. 1915 October, 25. — A. S. No. 47 of 1914.

Hindu law—Partition—Partial partition—Presumption.

Per Seshagiri Aiyar, J. (*Wallis, C. J.* dubitante). Where a partition deed between a father and son in terms purports to effect an actual division of only some of the items of the joint family properties, the presumption is that they intend to become divided in status with regard to all the family properties, and not merely with reference to the properties specified.

Per Seshagiri Aiyar, J.—Partial partition is unknown to the ancient Hindu law and under the law as recognised by judicial decisions, it has to be specially pleaded and proved.

T. Rangachariar and *K. V. Krishnaswami Aiyar* for the Appellants.

S. Srinivasa Iyengar and *A. Krishnaswami Aiyar* for the Respondents.

The Chief Justice and Seshagiri Aiyar, J. 1915 October, 25. — A. S. No. 203 of 910.

Compromise—Reversioner—Suit by to impeach will of last male owner—Compromise —Neither dishonest nor fraudulent—How far binding on de facto reversioners.

---

1. (1905) I. L. R 29 M. 212.

Per Chief Justice.—A compromise by one reversioner in a suit instituted by him impeaching a will put forward by the sister's son of the last male owner in conjunction with the mother who was representing the estate on the ground of intestacy is not binding on the de facto reversioners when the reversion opens.

I. L. R. 24 A. 92 followed.

T. R. Ramachandra Aiyar and *G. S. Ramachandra Aiyar* for Appellants.

S. Srinivasa Iyengar, *A. Krishnaswami Aiyar* and *C. Padmanabha Iyengar* for Respondents.

The Chief Justice and Seshagiri Iyer, J. 1915 October, 25. — S. A. No. 271 of 1914.

Specific Performance—Contract of Sale—Suit for execution of sale-deed and for possession against vendor and his usufructuary mortgagees—Misjoinder of causes of action—Practice.

In a suit for specific performance of a contract to sell land it has been the practice of this Court to decree not only the execution of a conveyance but also delivery of possession to the vendee. This however could be done only as against the vendor and not as against the usufructuary mortgagees of the vendor, who are not proper parties to the suit.

K. Rajah Iyer for *S. Srinivasa Aiyangar* for Appellant.

V. Ramadoss for Respondent.

Sadasiva Aiyar and Napier, JJ. 1915 October, 25. — S. A. No. 2613 of 1913.

Civil Procedure Code S. 2 (ii)—Legal representative—Suit by creditor of a deceased person—Will—Executor—Legatee—Suit against persons in wrongful possession of estate—Decree—Execution—Rights of Auction-purchaser—Legatee, if bound by execution sale.

A debtor died leaving a will whereby he appointed an executor and bequeathed some property to the plaintiff. One of the creditors of the deceased brought a suit against the persons in wrongful possession of the estate of the deceased, on a debt due by him, and obtained a decree. In execution of the decree, the property bequeathed to the plaintiff was sold and purchased by the defendant. Neither the plaintiff nor the executor was a party to the suit and the proceedings in execution. In a suit by the plaintiff to recover possession of the property from the defendant, *Held* that the estate of the deceased was properly

represented in the creditor's action and that the defendant had acquired a good title to the properties purchased by him. In the absence of proof of fraud or collusion between the creditor and the representatives of the estate in the prior suit, it was not open to the plaintiff to set aside the prior proceedings and recover possession of the property in the hands of the defendant.

Ramaswami Chetty v. *Oppilamani Chetty* [1] followed. *Kaliappan Servaigaran* v. *Varadarajulu* [2] distinguished.

G. S. Ramachandra Iyer for Appellant.
T. V. Muthukrishna Iyer for Respondent.

Wallis, C. J.
and Seshagiri Iyer, J } A. S. No. 355 of 1913.

Religious Endowments Act, (XX of 1863) Ss. 3, 4, 12 and 14 —Hindu Temple—Scheme—Jurisdiction of Court, to frame—Temple Committee, powers of—Existence of Committee, no bar to a scheme by court.

Courts in India have jurisdiction to frame a scheme for the proper management of religious institutions even in cases coming within the operation of the Religious Endowments Act. This power over religious institutions inheres in the Court as *parens patriae* and is similar to the powers of the Court of chancery in England, over charitable trusts, subject to the ordinary visitorial jurisdiction. Act 20 of 1863, is intended to cover all classes of religious institutions in India and the Srirangam Temple falls either under S. 3 or under S. 4 of the Act.

The Temple Committee being a statutory body having statutory powers, any scheme framed by the Court must not infringe the clear provisions of the Act.

Per Chief Justice.—Act 20 of 1863 is very general in its terms and ought to be construed very liberally. The Temple Committee are the successors of the Board of Revenue and there is no warrant for curtailing their powers under the Act, in spite of the decisions which restrict their powers.

Per Seshagiri Iyer, J.—On the principle of *Stare decisis*, the powers of the Temple Committee must now be taken to be limited, but that is no ground for withholding from them the powers they do possess under the Act.

T. V. Venkatarama Iyer for Appellant.
P. R. Ganapati Iyer for 1st Respondent.
T. Narasimha Aiyangar for 3rd Respondent.

---

1. (1909) I. L. R. 33 M. 6.   2 (1909) I. L. R. 33 M. 75.

NOTES OF RECENT CASES.

Sadasiva Aiyar and Napier, JJ.
1915, October 26.

S. A. No. 2783 of 1913

Vendor and purchaser—Covenant for title—Breach—Date of—Date of sale or of eviction of vendee.

A breach of a covenant for title attached to a conveyance either expressly or by statute occurs once for all on the date of the sale-deed itself and not on the date of the eviction of the vendee by a person claiming under title paramount.

[31 M. 452 (1913) M. W. N. 1029 followed].

M. Patanjali Sastri for P. *Narayanamurti* for Appellant.

T. V. Venkataramaiyar for Respondeut.

The Chief Justice, and Seshagiri Iyer, J.
1915 October, 27.

A. S. No. 94 of 1912.

Hindu law—Adoption—Consent of Sapindas—Degree of relationship—Nature of consent required to validate adoption by widow—Omission to consult effect.

In the case of an adoption by a Hindu Widow, the assent of the sapindas is a substitute for the authority of the husband and *prima-facie* the consent of all those who are in the direct line of succession to the deceased husband must be obtained. Where a Hindu Widow adopts with the consent of the majority of the sapindas of her husband, but without consulting a few of the nearest sapindas, the adoption is invalid.

Quaere: Whether an authority to adopt given to the widow by the then nearest reversioner spends itself out by lapse of time.

Subramanyam v. *Venkamma* [1] followed.

T. Rangachariar and *V. Ramdoss* for Appellants.

S. Srinivasa Ayangar and *V. Ramesam* for Respondents.

The Chief Justice, Seshagiri Iyer, J.
1915 October, 27.

A. S. No. 113 of 1910.

Madras Irrigation Cess Act, (VII of 1865) S. 1—Madras Land Encroachment Act (III of 1905) S. 2—River flowing through Zemindari—Zemindar, owner of bed and banks at the place of diversion—Government, if can levy cess.

Where both the banks and the bed of a river belong to the Zemindar, at the place where the diversion takes place, the

1. (1903) I. L. R., 26 M. 627.

Government cannot be said to be the owner of flowing water at the place of diversion so as to entitle them to levy cess under S. 1 of Act VII of 1865, on the lands irrigated by the water so diverted from the river.

The Secretary of State for India v. *Jankiramayya* [1], Referred to.

S. 2 of Act III of 1905 is declaratory and governs the interpretation of S. 1 of Act VII of 1865.

The Government Pleader for Appellant.

V. Ramesam for Respondent.

Sadasiva Aiyar and Napier, JJ. *1915 October, 27.* — S. A. Nos. 2275 to 2278 of 1914.

Limitation Act, Art. 120 & 144—Suit, by heir of deceased Mahomedan for recovery of his share of movable and immovable—Limitation—Starting point.

Where a Mahomedan dies intestate, the estate is at once vested in his heirs as tenants-in-common. Where one of the heirs sues to recover his share of the movable and immovable properties from his co-heirs, Art. 120 is applicable to the claim for movables and Art. 144 to the claim for immovable property. Limitation in both cases begins to run only from the date when the plaintiff was actually ousted by his co-heirs.

Khadersa Haji Bappu v. *Puthen Veetil Ayissa Ummah* [2], Referred to.

M. D. Devadoss for Appellant.

T. R. Ramachandra Iyer and *N. A. Kishna Iyer* for Respondents.

Coutts Trotter and Srinivasa Ayangar, JJ. *1915 October, 29.* — A. S. No. 302 of 1913.

Joint Mortgagees—Payment to one, if a good discharge against all.

Where there are several persons who on the face of the instrument of mortgage are joint-creditors, payment to one of them is a good discharge as against all.

Annapurnamma v. *Akkayya* [1] followed.

S. Muthiah Mudaliar for Appellant.

V. Visvanatha Sastri and *A. Krishnaswami Iyer* for Respondent.

---

1. (1915) 29 M. L. J. 389. (F. B.) 2. (1910) I. L. R. 34 M. 511.

NOTES OF RECENT CASES.

Sadasiva Aiyer, J.
Napier, J.
1915 October, 27.
S. A. No. 90 of 1914.

Limitation Act of 1908, Art. 132—Charge—Suit for enforcing—Kuri for fixed period—Discontinuance before expiry of period—Suit by subscriber for loss sustained by—Limitation—Cause of action—Agreement by president charging his property with payment of loss—Effect.

Where an agreement executed by the president of a kuri started in 1890 provided that the kuri was to be continued till 1899 by the president himself or his heirs and charged the property of the president for any loss sustained by them by reason of the discontinuance of the kuri before the period, *held*, in a suit by a subscriber for the recovery of the loss sustained by him by reason of the discontinuance of the kuri in 1893 and for having it charged on the property of the president, that the cause of action arose on the date of the discontinuance and not on the date of the expiry of the term of the kuri. On the date of the discontinuance of the kuri, the kuri contract became impossible of performance.

B. Sitarama Rao for Appellant.

K. Y. Adiga for Respondent.

Sir John Wallis, C. J.
Seshagiri Aiyar, J.
1915 October, 28.
A. S. No. 35 and 422 of 1914.

Limitation Act of 1908, S. 6 cls. (3) and (4)—"Legal representative."—Hindu Law—Minor father and his undivided minor son—Latter if legal representative of former—Minor—Alienation of property of, by guardian—Death of minor during minority leaving undivided minor son—Suit by son to set aside alienation—Limitation.

Where the guardian of a Hindu minor alienated the minor's property in 1880, and the minor died in 1893 while still a minor and leaving behind him an undivided adopted son who was also a minor, and the latter instituted a suit in 1911, within 3 years of his attaining majority, to set aside the alienation, *held* that the suit was not barred by virtue of cls. 3 and 4 of S. 6 of the Limitation Act of 1908. The undivided minor son is the legal representative of his minor adoptive father within the meaning of the said clauses.

T. R. Ramachandra Aiyar for Appellant.

S. T. Srinivasagopalachariar and *R. Satyamurti Aiyar* for Respondents.

Chief Justice and Ayling, JJ. 1915 October, 29. — S. A. No. 769 of 1914.

Madras Estates Land Act, S. 6—Applicability—Transferee from yearly tenant against whom decree in ejectment was got after Act, if entitled to benefit of Section.

Where, in a suit in ejectment brought by a landlord against a tenant on the ground that the defendant did not either pay rent to the plaintiff or exchange pattas and muchilikas with him, the defendant pleaded that the land was inam but it was found that the land was zeroyati land and that the defendant was transferee from the original tenant who was only a yearly tenant and against whom a decree in ejectment had been obtained after the Act and while the defendant was in possession, *held,* that the defendant was entitled to the benefit of S. 6 of the Act as his transferor if he had continued in possession till July 1908, would have acquired occupancy rights.

B. N. Sarma and K.S. Aravamuda Aiyangar for Appellants.

Respondent not represented.

Sadasiva Aiyar, J. Napier, J. 1915, November 1. — S. A. No. 329 of 1914.

C. P. Code, S. 11—Mortgage—Decree for sale—Provision in decree, for redemption within a fixed time—Subsequent suit by mortgagor for redemption, barred.

Where in a suit for sale by a mortgagee a decree was passed entitling the mortgagor to get possession of the mortgaged property on payment of the mortgage money within a time fixed by the decree, a subsequent suit for redemption by the mortgagor is barred by *res judicata.*

T. M. Krishnaswami Aiyar for Appellant.

K. R. Rangaswami Aiyangar and *P. V. Parameswara Iyer* for Respondents.

NOTES OF RECENT CASES.

Coutts-Trotter and Srinivasaiyangar JJ. 1915 November 1 — A. S. 217 of 1914.

Limitation Act of 1908—Art. 93—"Attempt to enforce instrument"—Meaning—Hindu Law—Reversioner—Suit for declaration that will of last owner was a forgery—Limitation—Succession certificate Act—Application by widow of last owner under—Widow basing her claim on being nearest heir but mentioning husband's will in her favour—Notice of petition to reversioners—Effect.

Where a childless Hindu widow presented a petition under the Succession Certificate Act, for the grant of a certificate entitling her to collect the debts of her husband, basing her claim on the fact of her being the nearest heir under the Hindu Law, but also incidentally mentioning the existence of a will of her husband in her favour, and notice of her petition was given to the near relatives of her husband, *held*, in a suit subsequently brought by the near relatives of her husband above-mentioned for a declaration that the said will was a forgery, that the mention of the will in the petition was not an attempt to enforce it against the near relatives within the meaning of Art. 93 of the Limitation Act and that the suit was not barred because it was instituted more than 3 years after the date of the said petition.

P. Narayanamurti and P. Somasundaram for Appellant.

T. Rangachariar and B. Narasimha Rao for Respondents.

Sadasiva Aiyar and Napier, JJ. 1915 November, 2. — S. A. No. 341 of 1914.

Practice—Second appeal—Remand by High Court—Lower Appellate Court, if can disturb findings of fact—Civil Procedure Code O. 21 R. 46—Prohibitory order—Suit for damages—Limitation—Limitation Act, Art. 29, 36 and 42.

When in second appeal, the High Court reverses and remands the case to the District Judge for disposal, it is not open to the successor-in-office of the Judge who originally decided the case to re-open the findings of fact given by his predecessor.

Where movable property in the possession of a third person who is not the judgment-debtor is attached by a prohibitory order under O. 21 R. 46 (1) (*c*) (*i*), Civil Procedure Code the prohibitory

order is not an injunction within the meaning of Art. 42 of the Limitation Act.

A suit for damages caused by such wrongful attachment will be governed by Art. 29 or 36 and not by Art. 42 of the Limitation Act.

The Limitation Act and the Civil Procedure Code being Acts in *pari materia*, words like "injunction," "arrest," etc., must be understood in the sense in which they are used in the Civil Procedure Code.

V. Ramdoss and *K. G. Sarangaraja Iyengar* for Appellants.

T. Rangachariar and *M. Purshotam Naidu* for Respondents.

Sadasiva Aiyar and Napier, JJ.
1915 November, 2.

S. A. No. 907 of 1914.

Alyasantana Law—Self-acquisition, devolution of.

The self-acquisition of an Alyasantana male or female goes to all the members of the branch to which he or she belonged and not merely to the nearest relations among them.

Held, accordingly, that a pre-deceased maternal aunt's children took along with the maternal aunt in existence at the death of the acquirer.

J. L. Rosario and *K. P. Lakshmana Rao* for Appellant.

B. Sitarama Row for Respondent.

Sadasiva Aiyar J.
Napier, J.
1915 November, 2.

S. A. No. 92 of 1914.

Limitation Act, Art. 12—Execution Sale—Suit to set aside—Minor defendant not impleaded as major though he attained majority before decree—Decree and execution proceedings not void—Civil Procedure Code O. 32 Rr. 12 and 13.

Where a minor defendant attained majority sometime prior to the passing of the decree in a suit, but the decree and the execution proceedings went on the footing that the defendant was still a minor represented by his guardian-ad-litem, *Held*, that the decree, and the execution-sale in pursuance thereof, were not void as against the minor and that it was the duty of the minor to have intervened in the proceedings on his attaining majority. Though in the case of minor defendants, there is no provision in the Civil Procedure Code corresponding to O. 32 Rr. 12 and 13, the principle of these rules applies to them also. A suit to set aside an

execution sale under the above circumstances is governed by Art. 12 of the Limitation Act.

A. Krishnaswami Aiyar for Appellant.

T. Prakasam for Respondent.

Sadasiva Aiyer, and Napier, JJ. *1915 November, 2.* — S. A. No. 907 of 1914.

Aliyasantana Law—Self-Acquisitions of member of—Devolution—Branch, Tarwad or nearest heir.

The self-acquisitions of a member of an Alayasantana family devolve on his death on the branch and in the absence of the branch on the tarwad and not on the nearest heir.

C. Madhavan Nair, J. L. Rozario, K. P. Lakshmana Rao, for Appellant.

H. Balakrishna Rao, B. Sitarama Rao, and *K. Y. Adiga,* for Respondent.

Ayling and Phillips JJ. *1915 November, 2.* — S. A. Nos. 1089 to 1091 of 1914.

Madras Act. II. of 1892 as amended by Act of 1900. S. 4—"Proprietor"—Meaning—Receiver of Nidadavole Estate a "proprietor" for making nominations of village officers under S. 15 of Madras Act II, of 1894.

Held, The Receiver of the Nidadavole Estate is a "proprietor" within the meaning of S. 4 of Madras Act II, of 1894 as amended by the Act IV of 1900 for the purpose of making nominations of village officers under S. 15 of Madras Act II of 1894.

Government Pleader with P. Somasundaram for Appellant.

P. Nagabhushanam, for *L. A. Govindaraghavaiyar,* and *V. Ramesam* for Respondent.

Coutts-Trotter and Srinivasa Aiyangar, JJ. *1915 November, 3.* — A. S. Nos. 103, 131 of 1914.

Marumakatayam Law—Person governed by—Will by—Bequest in favour of eldest son—Bequest if enures to benefit of family of legatee.

Held: a bequest by a person governed by the Marumakatayam law in favour of his eldest son does not enure to the benefit of the family of which the legatee is the eldest member and manager.

C. V. Ananthakrishna Aiyar and P. S. Narayanaswami Aiyar and *C. Madhavan Nair* for the Appellants in both Appeals.

T. R. Ramachandra Aiyar and *N. A. Krishnna Aiyar* for Respondents in both Appeals.

Sir John Wallis, C. J.
Seshagiri Aiyer, J.
1915 November, 4.

A. S. No. 20 of 1913.

Transfer of Property Act S. 118—Exchange of land—Absence of registered deed—Change of possession—Payment of money for excess area—Erection of costly buildings — Part-performance, doctrine of—Estoppel—Statute.

The defendant was put in possession of the suit land under an unregistered exchange deed executed between him and the plaintiff. Subsequently the defendant erected a costly superstructure worth Rs. 40,000 on what was admittedly his own land and on the suit land which he had obtained in exchange from the plaintiff. As the building was about to be raised the plaintiff received a sum of Rs. 500 from the defendant on the ground that the land which the former got in exchange was deficient in area. The plaintiff though aware of the erection of the superstructure on the suit land did not object to it at the time. The plaintiff subsequently sued to recover possession of the suit land on the ground that no title had passed to the defendant, the instrument of exchange being unregistered.

Held, Per *Wallis, C. J.*:—On the principle of *Ramsden* v. *Dyson* [1], the plaintiff was estopped from asserting his title to the suit property and his suit ought to be dismissed. It is doubtful if the decision in *Kurri Veerareddi* v. *Kurri Bapireddi* [2], is good law having regard to the very wide language of the Privy Council in *Mahomed Musa* v. *Aghore Kumar Gangali* [3].

Per *Seshagiri Iyer. J.*:—The plaintiff was entitled to succeed though he was liable to pay compensation to the defendant for the loss sustained by the latter.

The decision in *Kurri Veerareddi* v. *Kurri Bapireddi* [2], is still good law even after the decision of the Privy Council in *Mahomed Musa* v. *Aghore Kumar Gangali* [3].

The defendant could not rely on any title by estoppel as that would enable him to acquire a title contrary to the express provisions of S. 118 of the Transfer of Property Act.

S. Srinivasa Aiyangar and *K. Rajah Aiyer* for Appellants.

A. Krishnaswami Aiyer for Respondents.

---

1. L. R. 1 H. L. 141.
2. (1904) I. L. R. 29 M. 336.
3. (1915) I. L. R. 42 C. 801=28 M. L. J. 548.

Sadasiva Iyer J.
Napier, J.
1915 November, 5.
A. S. No. 9 to 14 of 1913.

Hindu Law—Partition—Partial partition—Presumption—Burden of proof—Single cause of action for partition—Second suit for partition, when maintainable.

Per Napier, J.:—Though a co-parcener cannot enforce a partition of a part only of the common lands leaving the rest undivided, and although the entire property must be included in the partition, yet, if by mistake or consent of the co-parceners a partition of a portion only of the estate is made, whether by decree of court or otherwise, there is no reason why the court should not grant a division of the remainder at the instance of one or more of the co-parceners.

Per Sadasiva Aiyar, J.:—Partial partition is unknown to the Hindu Law. Once a partition has been made, the presumption is strong that the severance was complete and the onus of rebutting it is on the person claiming a fresh partition. Except on the ground of fraud, mistake, or accident a partition once made cannot be re-opened. There is a only a single cause of action for partition and successive suits for partition are barred both under S. 11 and O. 2 R. 2 of the Civil Procedure Code.

K. Ramanath Shenai for Appellants.

T. Prakasam for Respondents.

Sadasiva Aiyar, and
Napier, JJ.
1915, November, 5.
S. A. No. 971 of 1914.

Evidence Act—S. 92 Proviso (1)—Mortgage—Wrong description of property—Evidence to show property really intended to be mortgaged—Admissibility—Specific Relief Act—S. 31—Rectification—Suit for, when necessary.

Where, in a suit by a puisne mortgagee, the question was raised as to whether one of the defendants held a prior mortgage of the suit property, *held* it was open to that defendant to adduce evidence to show that, notwithstanding the wrong description of the property in the deed of mortgage, the suit property was intended to be mortgaged. Such evidence is admissible under S. 92 Proviso (1) of the Evidence Act. It is not necessary for the prior mortgagee to obtain a rectification under S, 31 of the Specific Relief Act

except in cases where the rights of innocent third parties are affected.

V. Ramadoss for Appellant.

T. Ramachandra Rao for Respondent.

Sadasiva Iyer and Napier, JJ. *1915 November, 8.* — S. A. No. 1408 of 1914.

Lease for term—Deed executed by lessee—Provision for renewal—Ejectment suit after expiry of term—Lessee if entitled to resist suit on strength of covenant for renewal—Absence of registered instrument in pursuance of covenant for renewal—Effect.

Where a lease-deed, executed in favour of the District Board of Tanjore, was for a period of 10 years and provided for a renewal by a clause which ran as follows:—"I shall on the expiry of the stipulated period again execute a rent deed in this manner. In default to execute as aforesaid you may yourselves take possession of the aforesaid site (*i.e.* the site leased);" *held,* in a suit brought after the expiry of the period fixed for the ejectment of the lessee, that, assuming that the alleged covenant for renewal was enforceable against the lessor, the lessee could not resist the suit on the strength thereof so long as he had not in his favour a registered instrument entitling him to continue in possession after the period fixed and that his remedy, if any, was to sue for specific performance of the covenant for renewal.

13 M. L. J. 217; 29 M. 336; 30 M. 300 followed.

L. A. Govindaraghava Aiyer for Appellants.

V. Ramasawmy Aiyengar for Respondents.

Sadasivayar and Napier JJ. *1915 November, 8.* — S. A. 841 of 1914.

Mortgage—Kanom—Lease by Kanomdar—Surrender to jenmi—Lessee in possession—Ejectment.

A *Kanomdar* leased out the land on a yearly tenancy and subsequently received the *Kanom* amount and surrendered the property to the *jenmi*. The lessee, however, continued in possession for more than 12 years after the surrender of the *Kanom*. *Held* (1) that it was within the power of the *Kanomdar* to let out the land on a yearly tenancy (2) that the relationship of landlord and tenant was created between the *jenmi* and the tenant in possession, after the surrender of the *Kanom*, and (3) that it was open to the *jenmi* to terminate the tenancy by a proper notice, and thereafter enter into possession of the land.

P. Appu Nair for Appellant.

C. V. Ananthakrishna Ayar for Respondent.

NOTES OF RECENT CASES.

Coutts-Trotter and Srinivasa Aiyangar, JJ. 1915 November, 9.

A. S. No. 91 of 1914. (Memo of Objections.)

*Hindu Law—Partition—Minor, when entitled to re-open—*onus—*Family arrangement.*

A partition made during the minority of one of the members of a joint Hindu family will be valid and binding on the minor if his interests were represented by his guardian or some one acting on his behalf. If the minor seeks to re-open the partition, the *onus* of proving any invalidating circumstance is upon him.

A family arrangement will be upheld by Courts even though some of the parties thereto retained some property which the Court finds they were not solely entitled to. The Court does not in such cases consider narrowly the *quantum* of consideration.

B. Somayya for Appellants.

L. A. Govindaraghava Iyer with *B. Narasimha Rao* for Respondent.

Sadasiva Aiyar and Napier, JJ. 1915 November, 10.

S. A. No. 1173 of 1914.

Transfer of Property Act S. 41—Bona fide *purchaser—Nature and scope of inquiry—Question of fact—Penalty—Compound interest at enhanced rate.*

The nature and extent of the inquiry which a *bona-fide* purchaser is required to make under S. 41 of the Transfer of Property Act, depend on the circumstances of each case. Where a bond provides 9 % simple interest till the date fixed for payment and 10½ % compound interest on default, the stipulation for enhanced interest is a penalty.

G. S. Ramachandra Iyer for Appellants.

T. V. Venkatarama Iyer for Respondents.

Coutts-Trotter and Srinivasa Aiyangar, JJ. 1915 November, 10.

A. S. No. 96 of 1914.

Evidence Act S. 92 (4)—Registration Act, S. 17 (v)—Registered lease—Unregistered agreement to cancel, on the happening of an event—Admissibility.

A sued for a declaration that a registered lease executed by him in favour of B was not binding on him and for cancellation

of the same. The suit was based on an oral agreement contemporaneous with the lease, which was subsequently reduced to writing and signed by B, but not registered. Under the agreement B agreed that the lease should be cancelled and that he would relinquish his rights thereunder by a registered deed, if he failed to procure a loan for A at a low rate of interest. B was unable to procure the loan as agreed. *Held* that A's suit should be decreed. The subsequent agreement did not require registration as it came within S 17 Cl. (v). of the Registration Act and S. 92, proviso (4) of the Evidence Act did not render it inadmissible in evidence.

P. Narayanamurti and B. Somayya for Appellants.

T. Rangachariar and K. Krishnaswami Iyengar for Respondents.

Wallis, C. J., Sadasiva Aiyar and Seshagiri Aiyar, JJ. 1915 November, 10. — L. P. A. No. 61 of 1915.

Registration Act S. 49—Partition deed—Division of movables and immovables—Deed inseparable — Inadmissibility in evidence, without registration.

Where an unregistered document purports to effect a partition both as regards movables and immovables and it is found that the parties did not contemplate a partition of movables as distinct from a partition of the immovables, *Held* that the document, being unregistered, was inadmissible in evidence, to prove a division both as regards movables and immovables.

A. Krishnaswami Iyer for Appellant.

S. Srinivasa Iyengar and *G. S. Ramachandra Iyer* for Respondent.

Sadasiva Aiyar and Napier, JJ. 1915 November, 11. — S. A. No. 1575 of 1914.

Civil Procedure Code O. 34 Rr. (4) & (5)—Decree for sale—Marshalling—Right of purchaser of portion of the property—Frame of the decree.

A mortgagor sold a portion of the mortgaged property to A free of the mortgage and subsequently sold the remaining items to B who undertook to discharge the mortgage. B having failed to discharge the mortgage, the mortgagee brought a suit for sale,

Held that it was not obligatory on the Court to direct by its decree that the property in B's hands should be sold first before the properties in A's. hands could be proceeded against.

31 M. 419 followed.

G. S. Ramachandra Iyer for Appellant.

K. Ramachandra Iyer and *S. T. Srinivasagopalachari* for Respondents.

Kumaraswami Sastri, J.
1915 November, 11.

C. M. P. No. 2755 of 1915.

Civil Procedure Code S. 151, O. 1 R. 10—Parties, addition of—Inherent power of Court.

A Court has inherent power to add a person as a party to a proceeding, suit, or appeal, if such a course is likely to avoid multiplicity of legal proceedings. Where a person, who had purchased in Court-auction certain properties which the Respondent decree-holder, in a pending appeal, had offered as security for restitution in respect of a money decree obtained by him and against which the appeal was pending, applied to be made a party respondent to the appeal, *held* that the High Court had jurisdiction to add him as a Respondent.

[12 C. L. J. 91; 22 Q. B. D. 666 followed.]

T. M. Krishnaswami Iyer for *G. S. Venkatarama Iyer* for Petitioner.

C. Kishnamachariar for Counter-petitioner.

Coutts-Trotter and Srinivasa Iyengar, JJ.
1915 November, 15.

A. S. No. 108 of 1914.

Hindu Law—Widow—Alienation of whole estate—Consent of reversioner—Estoppel.

Where a Hindu widow alienates the whole estate with the consent of the next reversioner given for consideration, however inadequate, the reversioner is estopped from contesting the validity of the alienation on the death of the widow.

T. R. Venkatarama Sastri and *C. V. Ananthakrishna Iyer* for Appellants.

T. Rangachariar and *S. Muthiah Mudaliar* for Respondents.

Sadasiva Aiyar and Napier, JJ.
1915 November, 16.

S. A. No. 741 of 1914.

Hindu Law—Widow—Alienation—Subsequent surrender—Re-marriage, Effect of.

A Hindu widow cannot by relinquishing her widow's estate in favour of the reversioners affect the validity of alienations made by her before such relinquishment. Such alienations though not binding on the actual reversioners, will be good during the widowhood of the alienor.

Quaere. What is the effect of the re-marriage of the widow on such alienations ?

26 M. 143 ; 1914 M. W. N. 735 referred to.

B. Narasimha Row for Appellants.

K. S. Ganesa Iyer for *G. Venkataramiah* for Respondents.

Kumaraswami Sastri, J.
1915 November, 16.

C R. P. No. 436 of 1914.

Inherent power—Court—Correction of mistake.

Every Court has got an inherent power to set aside an order passed by it under mistake. This power is independent of the Civil Procedeure Code and is exerciseable by a District Munsif acting under S. 73 of the Madras Village Courts Act.

G. S. Ramachandrier for Petitioner.

S. Muthiah Mudaliar for Respondent.

NOTES OF RECENT CASES.

Napier, J.
1915 September, 28.

C. R. P. No. 1005 of 1914.

Civil Procedure Code S. 20, Cl. (c)—Suit on a promissory note—Jurisdiction—Place of indorsement—Cause of action, where arises.

A suit on a promissory note is maintainable in a Court within the jurisdiction of which it was endorsed.

22 Q. B. D. 128 referred to.

B. Somayya for Petitioner.

V. Ramadoss for Respondent.

Kumaraswami Sastri, J.
1915 November, 10.

C. R. P. No. 688 of 1914.

Limitation Act of 1908 Art. 182—Execution of decree—Application in accordance with law—Joint decree-holders—Application by one of—Application not under O. 21, R. 15 of the Code of Civil Procedure.

An application by one of several joint decree-holders for the execution of the decree is an application in accordance with law within the meaning of Art. 182 of the Limitation Act, though it is not made under O. 21, R. 15 of the Code.

T. Ramachandra Rao for Petitioner.

C. S. Venkatachari for Respondents.

Chief Justice, Seshagiri Aiyar and Phillips, JJ.
1915 November, 23.

L. P. A. No. 386 of 1914.

High Court—Appellate Side Rules—Rule 75—Appeal posted for orders under—Power of Admission Court—Dismissal of appeal—Legality.

The Admission Court before which a Civil Miscellaneous appeal is posted for orders under Rule 75 of the Appellate Side Rules, High Court cannot dismiss the appeal. It can only extend the time fixed for payment or direct the appeal to be posted before a Bench.

T. Narasimha Aiyangar for Appellant.

L. A. Govindaraghava Aiyar for Respondent.

Chief Justice, Seshagiri Aiyar and Phillips, JJ. 1915 November, 24. } C. M. S. A. No. 120 of 1912.

Foreign Court — Jurisdiction — Voluntary Submission — Appearing under protest but pleading on merits—Effect.

Where an application under S. 44 of the Civil Procedure Code, for execution of a foreign judgment was opposed by the judgment-debtor on the ground that the foreign Court had no personal jurisdiction over him inasmuch as he was not resident within the territorial jurisdiction of that Court but it appeared that, though he had objected to the jurisdiction of that Court when sued there, he had pleaded on the merits, *held* that he had voluntarily submitted to the jurisdiction of that Court.

2 M. 407, overruled.

T. R. Krishnaswami Aiyar for Appellant.

L. A. Govindaraghava Aiyar for *C. V. Anantakrishnier* and *T. K. Govinda Iyer* for Respondents.

Chief Justice and Seshagiri Aiyar, J. 1915 November, 25. } O. S. Nos. 97 of 1914 and 14 of 1915.

Suit—Abatement—Partnership suit—Death of one of the defendants—Omission to bring his representative on record, Plaintiff becoming representative of deceased after order of abatement—Effect.

Where, in a partnership action, one of the defendants dies pending suit and his legal representatives are not brought on record, the whole suit abates and the fact that, subsequent to the order of abatement, the plaintiff becomes the representative of the deceased defendant does not affect the question.

31 C. 487 P. C. followed.

C. Venkatasubbaramiah and *C. P. Ramaswami Aiyar* for Appellant.

Venkatasubba Rao and *Radhakrishnayya* for Respondents.

Srinivasa Aiyangar, J.
1915 November, 16.

G. R. P. No. 475 of 1914.

Civil Procedure Code O. 9, R. 9, O. 17, Rr. 2 and 3—Suit, adjournment of, suo moto—*Absence of plaintiff and his witnesses—Application for adjournment by pleader—Dismissal of suit—Application to set aside.*

O. 17, R. 3 of the Civil Procedure Code is inapplicable to a case where the suit is adjourned, not at the request of a party, but by the Court owing to want of time. Where on such adjourned date, neither the plaintiff nor his witnesses were present, but his pleader merely asked for an adjournment which was refused and thereupon expressed his inability to conduct the case further with the result that the suit was dismissed. *Held*, that the order of dismissal was in effect one under O. 9, R. 8 and that the plaintiff could apply to set aside the dismissal under O. 9, R. 9 C. P. Code.

L. A. Govindaraghava Aiyar for Petitioner.

N. S. Rangaswami Aiyangar for Respondent.

Wallis, C.J.,
Seshagiri Aiyar, J.
Phillips, J.
1915 November, 22.

L. P. A. No. 50 of 1914.

Hindu Law—Joint Family—Self-acquisition—Rights of sons of the acquirer—Living together, effect of.

Where it is found that a Hindu father acquired properties by trade without any nucleus of ancestral property, the mere fact that he lives with his sons and maintains them in the same family-house will not give any right to the sons in the acquisitions of his father.

T. Rangachariar for Appellant.

W. V. Rangaswami Aiyangar for Respondent.

Sadasiva Aiyar, J.
Napier, J.
1915 November, 23.

S. A. No. 2661 of 1913.

Madras Estates Land Act—Tanjore Palace Estate, if within the Act.

The "Tanjore Palace Estate" is not an estate within the meaning of that term in S. 3, Cl. (2) of the Madras Estates Land Act, nor is it an "Inam" within the meaning of that term as understood in law.

T. R. Venkatarama Sastri for Appellant.

G. S. Ramachandra Iyer for Respondent.

Sadasiva Aiyar, J.
Napier, J.
1915 November, 26.
C. M. A. Nos. 146 and 147 of 1914.

Madras Estates Land Act S. 192—Order of Remand, appeal against, if competent.

No appeal lies against an order of remand passed by the District Court in a suit under the Madras Estates Land Act.

G. S. Venkatarama Aiyar for Appellant.

T. V. Gopalaswami Mudaliar for Respondent.

Sadasiva Aiyar, J.
Napier, J.
1915 November, 30.
C. M. A. No. 272 of 1914.

Civil Procedure Code Ss. 47 and 135—Appeal against order refusing to allow exemption from arrest to judgment-debtor—Maintainability.

An order under S. 135 of the Civil Procedure Code dismissing a petition by a judgment-debtor claiming exemption from arrest in execution of a decree against him, comes within S. 47 of the Civil Procedure Code and is appealable.

A. V. Visvanatha Sastri for Appellant.

K. S. Jayarama Aiyar for Respondent.

Sadasiva Aiyar and Napier, JJ.
1915 November, 30.
S. A. No. 1399 of 1914.

Damages—Malicious abuse of process—Obtaining order of attachment before judgment—Malice—Absence of reasonable cause—Suit for damages, if sustainable.

The mere obtaining of an order of attachment before judgment, however maliciously, and however great the want of reason-

able and probable cause, will not give rise to a cause of action for damages in the absence of any seizure of goods in pursuance of the order of attachment.

T. V. Gopalaswami Mudaliar for Appellant.

G. S. Ramachandra Aiyar for Respondent.

Abdur Rahim, J.
Ayling, J.
1915 December, 1.

C. R. C. No. 573 of 1915.

Criminal Procedure Code S. 488—Scope of—"Unable to maintain itself"—Meaning—Malabar Law—Children entitled to maintenance from mother's Tarwad—Right for maintenance against father.

S. 488 of the Code of Criminal Procedure does not cover the same ground as the civil liability of a father. The words "unable to maintain itself" in the section are not confined to the case of physical inability to earn a livelihood.

Held:—Children who have a legally enforceable right to maintenance from, or are actually maintained by, their mother's Tarwad, are not entitled to an order for maintenance, under S. 488, against their father.

[1913 M. W. N. 907 dissented from.]

[19 M. 161 Rel. upon.]

C. Kunhiraman, Vakil for Petitioner.

Abdur Rahim, J.
Ayling, J.
1915 December, 2.

S. A. No. 816 of 1915.

Hindu Law—Adoption—Dancing girls—Absence of Criminal intent—Adoption valid.

The adoption of a daughter by a dancing girl is valid, if the adoption was not made for the purposes of prostitution.

K. S. Jayarama Aiyar for Appellants.

G. S. Ramachandra Aiyar for Respondents.

Kumaraswami Sastri, J.
Phillips, J.
1915 December, 3.

S. A. No. 1003 of 1914.

Malabar Law—Tarwad—Tavazhi—Karnavan of both, Deed by—Description of property as Tarwad property—Effect.

The fact that, in a deed executed by a person who is the Karnavan both of a Tarwad and of a Tavazhi, the property covered by it is described as his Tarwad property is not conclusive of the fact that the property belongs to the Tarwad as distinguished from the Tavazhi.

P. S. Narayanaswami Aiyar for *C. V. Anantakrishna Aiyar* for Appellant.

A. Sundaram for Respondent.

Coutts-Trotter, J.
Srinivasa Aiyangar, J.
1915 December, 6.

A. S. No. 339 of 1913.

Limitation Act of 1908—Art. 106—Partnership—Suit for account of dissolved partnership—Limitation—Cause of action—Partnership between managing member and one of junior members of joint Hindu family on one side and stranger—Death of junior member—Dissolution of partnership.

Although, where the managing member of a joint Hindu family is a member of a trading corporation, the family property, including the shares of the other members, may be proceeded against in certain contingencies by the firm and its creditors, yet the family as such does not thereby become a partner.

"Partner" defined.

Where the managing member and one of the junior members of a joint Hindu family entered into a partnership with a stranger *held*, in a suit for accounts brought more than 3 years after the death of the junior member, that the suit was barred by limitation as the partnership was dissolved, by his death and on the date thereof.

[36 M. 185, 192 P. C. explained and distinguished.]

[28 M. 344 followed.]

C. V. Anantakrishna Aiyar for Appellant.

A. Krishnaswami Aiyar (*M. Patanjali Sastri* with him) for Respondent.

Kumaraswami Sastri, J.
Phillips, J.
1915 December, 6.

S. A. No. 1129 of 1914.

Civil Procedure Code of 1908—S. 102—Second appeal—Suit of Small Cause Nature—What is—Suit for possession of land or for rent—Decree for rent only—No appeal as regards claim for possession—Second appeal—Maintainability.

In determining whether a suit is a suit of a Small Cause Nature within the meaning of S. 102 of the Code of Civil Procedure, regard must be had to the suit as originally brought.

Where, in a suit for possession of land or in the alternative for rent, a decree for rent alone was passed and no appeal was preferred as regards the claim for possession, *held* that the suit was nevertheless not a suit of a Small Cause Nature and there was a right of second appeal.

A. Sundaram for Appellant.

P. V. Parameswara Aiyar for *C. V. Anantakrishna Aiyar* for Respondent.

Kumaraswami Sastri, J.
Phillips, J.
1915 December, 7.

S. A. No. 1424 of 1912.

Malabar Law—Karnavan—Karar by, with consent of junior members—Improper withholding of consent by one of the junior members—Effect—Revocation of karar by karnavan—Validity—Conditions.

A karar entered into by the karnavan and some only of the members of a Malabar Tarwad is a family karar if the other members consent to it. It does not cease to be a family karar because one of the members, for reasons of his own, does not join in or consent to it. The revocation of such a karar by the karnavan is invalid unless the revocation is made with the consent of the other members or unless it is for the benefit of the Tarwad.

C. V. Anantakrishna Aiyar (with him *P. V. Parameswara Aiyar*) for Appellant.

T. R. Ramachandra Aiyar for Respondent.

Sadasiva Aiyar, J.
Napier, J.
1915 December, 7.

C. M. P. No. 2789 of 1914.

Civil Procedure Code of 1908—*Applicability to Agency Tracts—Madras Estates Land Act—Suit under—Applicability to, of Civil Procedure Code—S.* 192 *of Estates Land Act—Effect.*

S. 192 of the Madras Estates Land Act is subject to the limitation contained in S. 1 of the Code of Civil Procedure 1908. The Code does not, therefore, apply even to suits under the Estates Land Act brought in the Agency Tracts.

B. Somayya for *P. Nagabhushanam* for Petitioner.

V. Ramesam for Respondent.

Sadasiva Aiyar and
Napier, JJ.
1915 December, 7.

C. M. A. No. 295 of 1915.

Guardian and Ward—Mahomedan Law—Shafi School—Minority, limits of—Indian Majority Act—Minor of the age of 16, *in the custody of grandmother—Right of father to apply under S. 25 of the Guardian and Wards Act—Wishes of minor, value of.*

Though under the Shafi school of Mahomedan Law, a minor on attaining the age of 15 is entitled to claim emancipation from guardianship, the question of his minority must be decided under Act IX of 1875. Consequently among Mahomedans belonging to the Shafi sect, a father is entitled to the custody of his minor son of the age of 16. I. L. R. 9 M. 391 followed.

A father is entitled to apply under S. 25 of the Guardian and Wards Act, for the custody of his minor son of about the age of 16, though the minor had all along been in the custody of his grandmother and never in the custody of his father.

The weight to be attached to the wishes of the minor, considered.

S. Srinivasa Aiyangar and *K. Rajah Iyer* for Appellants.

C. V. Ananthakrishna Iyer and *N. M. Malim Sahib* for Respondents.

[*End of Vol. XXIX.*]